SUPREME COURT, U. S.

FILED

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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-958

NEWAL W. GRIFFIN

VS.

UNIVERSAL UNDERWRITERS INSURANCE COMPANY

Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

A. G. SEALE of
SEALE, SMITH & PHELPS
8225 Florida Boulevard
P. O. Box 15766, Broadview Station
Baton Rouge, Louisiana 70815

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Petitioner,

**PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF LOUISIANA**

The petitioner, Universal Underwriters Insurance Company, prays that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of the State of Louisiana rendered in these proceedings on September 24, 1973.

OPINIONS BELOW

The petition for certiorari in this case arises out of the defendant's in limine exception of res judicata to the plaintiff's suit for a workmen's compensation benefits under the Louisiana Workmen's Compensation Act, LSA-R.S. 23:1021 Et Seq. The unreported opinion of the 23rd Judicial District

Court for the Parish of Ascension rendered on December 9, 1971 is reprinted herein as Appendix A. The opinion of the Louisiana Court of Appeal for the First Circuit rendered on October 2, 1972 is reported at 268 So. 2d 702 (1972) and is reprinted herein as Appendix B. The opinion of the Louisiana Supreme Court rendered on September 24, 1973 is reported at 283 So. 2d 748 (La. 1973) and is reprinted herein as Appendix C. The judgment rendered by the 23rd Judicial District Court for the Parish of Ascension dated December 9, 1971, which judgment dismisses the plaintiff's suit on the exception of res judicata is reprinted herein as Appendix D. The judgment of the 23rd Judicial District Court for the Parish of Ascension dated January 21, 1972 denying the plaintiff's motion for a new trial on the exception is reprinted herein as Appendix E. The order of the Louisiana Supreme Court dated October 26, 1973 denying rehearing is reprinted herein as Appndix F.

JURISDICTION

The opinion of the Louisiana Supreme Court in this matter was rendered on September 24, 1973. See, Appendix C. The defendant's petition for certiorari to this Court was filed less than ninety (90) days after September 24, 1973. See, Rule 22, Rules of the Supreme Court of the United States. The jurisdiction of this Court invoked under 28 USCA § 1257(3).

QUESTION PRESENTED

The question presented is whether or not under the Full Faith and Credit Clause of the U. S. Constitution, Art. IV, §1, a final award of workmen's compensation benefits under the Texas Workmen's Compensation Act precludes a claimant from thereafter seeking additional workmen's compensation benefits for the same injury under the Louisiana Workmen's Compensation Act?

CONSTITUTIONAL PROVISION

The constitutional provision at issue in this case is found at Art. IV §1 of the U. S. Constitution providing in pertinent part that, "Full Faith and Credit shall be given in each State to the public Acts Records, and judicial Proceedings of every other State."

STATEMENT OF FACTS

The plaintiff, Newal W. Griffin, is a resident of Houston, Texas where he was employed as a truck driver by Keller Industries, Inc. (Keller), a corporation organized and domiciled in the State of Texas and engaged in interstate shipment of materials and goods. Keller, a member of the Motor Truck Owners Conference, Inc., was insured by a workmen's compensation insurance policy issued by defendant Universal Underwriters Insurance Company (Universal). On June 29, 1970, while driving one of his employer's trucks which had been leased to U.S. Van Lines, Inc., the plaintiff was involved in a motor vehicle accident in Ascension Parish, Louisiana from which accident he received serious personal injuries.

The plaintiff notified his employer, Keller, of the accident who in turn immediately informed U.S. Van Lines, the latter company then informing Universal. On July 21, 1970, Universal filed a report of the accident and resulting injury to the plaintiff with the Industrial Accident Board of the State of Texas (Texas Industrial Accident Board). The Texas Industrial Accident Board opened a file on the claim, and directed correspondence to the plaintiff requesting that all inquiries regarding his claim be made to the Board. In due course, defendant Universal initiated payment of workmen's compensation benefits to the plaintiff at the rate of $49.00 per week, the maximum allowable for permanent disability under the applicable workmen's compensation statutes of

both the State of Texas and the State of Louisiana. Universal also paid medical expenses to the plaintiff in the amount of $18,681.62.

On April 22, 1971, while still receiving workmen's compensation benefits from Universal, and without any notification to Universal, the plaintiff and his attorney settled the plaintiff's tort claim against the third party tortfeasor, executing at Houston, Texas an instrument styled a "Release, Indemnity, and Warranty Agreement," which provided in pertinent part:

> "Received of [third party tortfeasor] and State Farm Mutual Automobile Insurance Company the sum of Ten Thousand and No/100 ($10,000.00) Dollars, in consideration of which the undersigned Newal W. Griffin releases and discharges the said [third party tortfeasor] from any and all claims resulting from the automobile accident of 29 June 1970 . . .
>
> * * *
>
> "As an inducement for State Farm Mutual Automobile Insurance Company to pay him its policy limit of Ten Thousand and No/100 ($10,000.00) Dollars for bodily injury to one person under the terms of its automobile liability insurance policy issued to [third party tortfeasor], and as a further consideration for such payment, Newal W. Griffin hereby agrees to indemnify and protect State Farm Mutual Automobile Insurance Company and hold it harmless, against any workmen's compensation subrogation claim, or claim for damages, or other claims, that may be asserted against State Farm Mutual Automobile Insurance Company by Newal W. Griffin's employer and/or the workmen's compensation insurer of said employer . . ."

Sometime thereafter, in June, 1971, Universal became aware of the fact that the plaintiff had settled the tort claim and on June 29, 1971, Universal notified the plaintiff of its intention to suspend further workmen's compensation payments in accord with the applicable law of Texas. On July 14, 1971, Universal did in fact request the Texas Industrial Accident Board to suspend payment of further workmen's compensation benefits to the plaintiff in accord with Vernon's Ann.Civ.St., Art. 8307, §6a., which provides in pertinent part as follows:

> "§6a. Where the injury for which compensation is payable under this law was caused under circumstances creating a legal liability in some person other than the [employer] to pay damages in respect thereof, the employee may at his option proceed either at law against that person to recover damages or against the association for compensation under this law, but not against both, and if he elects to proceed at law against the person other than the [employer], then he shall not be entitled to compensation under this law. If compensation be claimed under this law by the injured employee or his legal beneficiaries, then the association shall be subrogated to the rights of the injured employee . . ."

The plaintiff made demand upon defendant Universal for resumption of workmen's compensation benefits, the same being denied, and on July 27, 1971, plaintiff filed this suit against Universal for workmen's compensation benefits under the Louisiana Workmen's Compensation Act, LSA-R.S. 23:-1021, Et. Seq. Unlike the Texas Act, the Louisiana Act permits the plaintiff to claim both workmen's compensation benefits from his employer and damages from the third party tortfeasor, the pertinent statute providing as follows:

> "When an injury for which compensation is payable under this Chapter has been sustained under

> circumstances creating in some person (in this Section referred to as third person) other than the employer a legal liability to pay damages in respect thereto, the injured employee or his dependent may claim compensation under this Chapter and the payment or award of compensation hereunder shall not affect the claim or right of action of the injured employee or his dependent against such third person, nor be regarded as establishing a measure of damages for the injury; and such injured employee or his dependent may obtain damages from or proceed at law against such third person to recover damages for the injury." LSA-R.S. 23:1101.

On August 18, 1971 the Texas Industrial Accident Board rendered the following ruling with respect to the plaintiff's Texas claim:

> "The Board finds that by reason of said Release, Indemnity, and Guarantee Agreement with the Third Party, said employee has made a final election, and all additional claims for benefits under the Texas Workmen's Compensation Act are denied."

The record discloses that the plaintiff and his attorney were each furnished with a copy of this ruling, the notice stating clearly and unmistakably that the plaintiff had a right to appeal the ruling within twenty (20) days from the date thereof. The plaintiff did not file an appeal within the stipulated time and the award became final. Instead, as noted above, on July 27, 1971 the plaintiff filed the instant suit in the 23rd Judicial District Court for the Parish of Ascension in the State of Louisiana. It was in this suit that Universal filed its in limine exception of res judicata urging that the final award of the Texas Industrial Accident Board precluded any further claim for workmen's compensation benefits in Louisiana.

The trial court sustained the exception and on December 9, 1971 entered a judgment dismissing the suit. The plaintiff appealed the trial court decision to the Court of Appeal for the First Circuit, which court rendered an opinion on October 2, 1972 affirming the trial court. The plaintiff then applied for and was granted a writ of certiorari to the Louisiana Supreme Court, the writ being granted on January 15, 1973. On September 24, 1973 the Louisiana Supreme Court rendered an opinion overruling the Court of Appeal and remanded the case to the trial court for further action.

Throughout these proceedings, Universal has relied on the Full Faith and Credit Clause of the U.S. Constitution, contending the ruling of August 18, 1971 by the Texas Industrial Accident Board was final and could not, if you will, be collaterially attacked by filing another suit for workmen's compensation benefits in the State of Louisiana. The applicability vel non of the Full Faith and Credit Clause was first raised by Universal in its in limine exception and has been urged consistently thereafter.

REASONS FOR GRANTING THE WRIT

The Louisiana Supreme Court failed to implement the Full Faith and Credit Clause, a course of action required under the circumstances of this case by *Magnolia Petroleum Co. vs. Hunt*, 320 U.S. 430, 64 S.Ct. 208, 88 L.Ed. 149 (1944).

The trial court and Court of Appeal each found *Magnolia* to be controlling, the issue there being posed by then Chief Justice Stone as follows:

> "The question for decision is whether, under the Full Faith and Credit Clause, Art. IV, §1 of the Constitution of the United States, an award of compensation for personal injury under the Texas Workmen's Compensation Law, Title 130 of the Revised

> Civil Statutes of Texas, Vernon's Ann.Civ.St. art. 8306 et seq. bars a further recovery of compensation for the same injury under the Louisiana Workmen's Compensation Law, Title 34, Chapter 15 of the Louisiana General Statutes Act No. 20 of 1914, as amended."

The facts before the Court in *Magnolia* are reported as follows:

> "The respondent Hunt is a resident of Louisiana employed in that state by the petitioner and sent by the petitioner to do work in Texas. While in Texas he was seriously injured in the course of his employment. Confined to a hospital he was told that he could not recover compensation unless he signed two forms presented to him. As found by the Louisiana trial judge there was printed on each of the forms 'in small type' the designation 'Industrial Accident Board, Austin, Texas.' To get his compensation Hunt signed the forms and the Texas insurer began to pay. Returning to his home in Louisiana Hunt apparently discovered that his interests would be more fully protected under the Louisiana law and notified the insurer of an intention to claim under the statute of that state. The insurer immediately stopped payment to him and notified the Texas Board to that effect. Four days later, without any request from Hunt, the Board notified him at his Louisiana home that a hearing would be held in Texas within two and one-half weeks 'to determine the liability of the insurance company' under Texas law. Hunt did not participate in that proceeding. The Texas Board thereafter made an award to him which, under the law of Texas, was equivalent to a judgment against the insurer. Before the Texas award became final, Hunt, who had declined to accept any money under it, filed suit against his employer in the Courts of Louisiana under the Workmen's Compensation Law of Louisiana. He recovered a judgment for a substantially larger sum than had been allowed him

> under the Texas award, from which the Louisiana Court deducted the sum he had already received from the Texas insurer." 320 U.S. at 450-451, 64 S.Ct. at 219.

This Court held in *Magnolia* that a final ruling rendered by the Texas Industrial Accident Board was res judicata and as such precluded the claimant there from seeking further benefits under the Louisiana Workmen's Compensation Act. In this case, Universal contends that the facts are even stronger against the plaintiff's position than in *Magnolia* where the Texas award was invoked to pretermit recovery of additional workmen's compensation benefits in Louisiana by a resident of Louisiana who had been employed in Louisiana. In this case, the plaintiff is a resident of Texas who was employed in Texas by a Texas corporation and now seeks to avail himself of what he considers to be the more liberal benefits afforded by the Louisiana Workmen's Compensation Act solely on the basis of the fact that the accident in which he was injured occurred in Louisiana.

There can be no doubt whatsoever that the Texas Industrial Accident Board had jurisdiction to render a final award of workmen's compensation benefits in this case because it involves a resident of Texas who was employed in Texas by a Texas corporation notwithstanding that the accident giving rise to the compensable injury occurred in Louisiana. The pertinent statute is Vernon's Ann.Civ.St., Art. 8306, §19, which provides as follows:

> "§19. If an employee, who has been hired in this State, sustain injury in the course of his employment he shall be entitled to compensation according to the Law of this State even if such inujry was received outside of the State . . .
>
> * * *

> "Providing that such injury shall have occurred within one year from the date such injured employee leaves this state; and provided, further, that no recovery can be had by the injured employee hereunder in the event he has elected to pursue his remedy and recovers in the State where such injury occurred."

We note too that it has been held time and again that a final ruling of the Texas Industrial Accident Board has the same force and effect as a final judgment of a court of that State. See, *Gentry vs. Travelers Insurance Co.*, 459 S.W. 2d 709 (Tex.Civ.App. 1970); *Ocean Accident & Guaranty Corporation vs. Pruitt*, 58 S.W.2d 41 (Tex.Civ.App. 1933).

The Louisiana Supreme Court declined to follow *Magnolia* and instead based its decision on *Industrial Commission of Wisconsin vs. McCartin*, 330 U.S. 622, 67 S.Ct. 886, 91 L.Ed. 1140 (1947). *McCartin* held that an award of workmen's compensation benefits under the Illinois workmen's compensation law did not preclude a further claim for benefits for the same injury under the Wisconsin workmen's compensation law. As the plaintiff would have it, *McCartin* overrules *Magnolia* and permits successive recovery of workmen's compensation benefits in more than one state for the same injury. We think not. *McCartin* itself clearly distinguishes *Magnolia* with the following language:

> "If it were apparent that the Illinois award was intended to be final and conclusive of all the employee's rights against the employer and the insurer growing out of the injury, *the decision in the Magnolia Petroleum Co. case would be controlling here.* The Court [in *Magnolia*] found that the compensation award under the Texas workmen's compensation law, was made explicitly in lieu of any other recovery for injury to the employee, precluding even a recovery under the laws of another state . . . and since

> the Texas award had the degree of finality contemplated by the Full Faith and Credit Clause, it was held that Louisiana was constitutionally forbidden from entering a subsequent award under its statute . . ." (Emphasis added.)

As further evidence of the fact that *Magnolia* is alive and well, we call the Court's attention to *Carroll vs. Lanza*, 349 U.S. 408, 75 S.Ct. 804, ————L.Ed.———— (1955). In *Carroll*, a resident of Missouri, while receiving compensation payments under Missouri law, for an injury sustained in Arkansas, was permitted to maintain an action for common law damages under Arkansas law notwithstanding the fact that the Missouri Workmen's Compensation Act provided that the rights and remedies granted hereunder "shall exclude all other rights and remedies . . . common law or otherwise." The Supreme Court through Justice Douglas for the majority with Justice Butler, Frankfurter and Harlan dissenting held:

> "The Court of Appeals thought *Magnolia Petroleum Co. vs. Hunt*, 320 U.S. 430, 64 S.Ct. 208, 88 L.Ed. 149, to be controlling. There the employee having received a final award for compensation in the forum of the injury returned to his home State and sued to recover under its Compensation Act. We held that the latter suit was precluded by the Full Faith and Credit Clause. But here there was no final award under the Missouri Act. Under that Act the statutory payments apparently start automatically upon receipt of notice of the injury. Mo.Rev. Stat. 1949, §§287.380, 287.400, V.A.M.S. While provisions are made for an adjudication of disputes between an employee and his employer (id. §§287.400, 287.450), no adjudication was sought or obtained here." 349 U.S. at 410-411, 75 S.Ct. at 806.

The Louisiana Supreme Court in this case declined to extend Full Faith and Credit to the final award of the Texas

Industrial Accident Board because of the following language found in *McCartin*:

> "* * * The reservation spells out what we believe to be implicit in that Act — namely, that an Illinois workmen's compensation award of the type here involved does not foreclose an additional award under the laws of another state. And in the setting of this case, that fact is of decisive significance.
>
> "Since this Illinois award is final and conclusive only of rights arising in Illinois, Wisconsin is free under the Full Faith and Credit Clause to grant an award of compensation in accord with its own laws. *Magnolia Petroleum Co. vs. Hunt*, 320 U.S. 430, 88 L.Ed. 149, 64 S.Ct. 208, 150 ALR 413, 15 NCCA NS 529, supra, thus does not control this case."

McCartin notwithstanding, the plain fact of the matter is that this Court in *Magnolia* has held squarely that an award of workmen's compensation benefits by the Texas Industrial Accident Board is a final and complete adjudication of all rights and causes of action for workmen's compensation benefits and as such entitled to Full Faith and Credit by sister States. We have already noted that Texas considers an award of the Texas Industrial Accident Board to have the same force and effect as a final judgment of the Courts of that state. See, *Gentry vs. Travelers Insurance Co.*, supra; *Ocean Accident & Guaranty Corporation vs. Pruitt*, supra. The Louisiana Supreme Court read *McCartin* to require "unmistakable language" in the Texas Workmen's Compensation Act which would operate to foreclose the plaintiff's right to further workmen's compensation benefits in the State of Louisiana. That inquiry, however, has already been answered by this Court in *Magnolia* which held that such an award was indeed final and entitled to the benefit of the Full Faith and Credit Clause. Cf., *Gasch vs. Britton*, 202 F.2d 356 (D.C.Cir. 1952).

Universal acknowledges that there are cases which have applied *McCartin* to permit successive awards of workmen's compensation benefits for the same injury in different states. See, e.g., *Agee vs. Industrial Commission*, 10 Arizona App. 1, 455 P.2d 288 (1969); *deCancino vs. Eastern Airlines*, 239 So.2d 15 (Fla. 1970); *Martin vs. L & A Contracting Company*, 249 Miss. 441, 162 So.2d 870 (1964); 3 Larson, *Workmen's Compensation*, 369-380.

These cases are not relevant here however, because this court has already held in *Magnolia* that a final award of the Texas Industrial Accident Board precludes a claimant from seeking further workmen's compensation benefits in the State of Louisiana, the very fact situation presented by this case.

CONCLUSION

For these reasons, petitioner Universal Underwriters Insurance Company prays that a writ of certiorari issue to review the opinion of the Louisiana Supreme Court rendered in these proceedings on September 24, 1973.

By Attorneys,

SEALE, SMITH & PHELPS
8225 Florida Boulevard
P. O. Box 15766, Broadview Station
Baton Rouge, Louisiana 70815

BY:
A. G. SEALE

CERTIFICATE

I hereby certify that a copy of the above and foregoing petition for a writ of certiorari has been mailed this day, postage prepaid, in compliance with Rule 33 of the Supreme Court of the United States to Mr. Paul H. Due', 519 Florida Boulevard, Denham Springs, Louisiana 70726.

Baton Rouge, Louisiana, this 20 day of December, 1973.

A. G. SEALE

APPENDIX A

NEWAL W. GRIFFIN	STATE OF LOUISIANA
VERSUS NO. 17,592	PARISH OF ASCENSION
UNIVERSAL	23RD JUDICIAL
UNDERWRITERS	DISTRICT COURT
INSURANCE COMPANY	s/Deputy Clerk
Filed: Dec. 9, 1971	Clerk of Court

REASONS FOR JUDGMENT

Plaintiff, a resident of the state of Texas, was employed in Texas by a Texas corporation, Keller Industries, Inc., as a truck driver. Keller Industries, Inc., as a member of Motor Truck Owners Conference, Inc., of Kansas City, Missouri, was covered by a Workmen's Compensation Policy issued by Universal Underwriters Insurance Company, also of Kansas City, Missouri, which according to the "Certificate of Insurance" issued by Universal Underwriters to Keller Industries, Inc., "protects all of its members and employees in accordance with the Workmen's Compensation Benefits applicable in each state." The Cerifticate of Insurance offers no amplification of what is meant by the phrase, "applicable in each state", and the policy itself is not filed in evidence.

Nn June 29, 1970, while driving a truck in the state of Louisiana, plaintiff was severely injured and permanently disabled when his vehicle was struck by an automobile owned by Leslie S. Richard and being driven by his wife, Connie C. Richard. The Richard vehicle was insured by State Farm Mutual Automobile Insurance Company.

The accident was routinely reported by Motor Truck Owners Conference, Inc. to Universal Underwriters which under date of July 21, 1970, made a "Report Of Initial Payment of Compensation" to the Industrial Accident Board of the State of Texas. The Industrial Accident Board thereafter under date of July 31, 1970, established a file on the claim

and sent Universal Underwriters a form letter stating, "A file has been established on above described injury, and Notice of Injury and Claim for Compensation forms mailed to the employee." The correspondence directed to plaintiff and to Universal Underwriters contains the following admonition: "ATTENTION - - - ALL INTERESTED PARTIES - - - All Future Correspondence And Communication Concerning This Case Should Be Directed To The INDUSTRIAL ACCIDENT BOARD . . . ." There is no proof however that the plaintiff ever received the notice and forms in question, and the record contains no "Claim for Compensation" or similar forms completed or signed by the plaintiff.

Universal Underwriters continued to pay compensation benefits to plaintiff at the rate of $49.00 per week from June 29, 1970, which payments were accepted by the plaintiff, and in addition paid medical expenses of $18,681.62.

On April 22, 1971, while still receiving compensation payments from Universal, and without any notification to Universal, the plaintiff and his attorney executed at Houston, Texas, an instrument entitled "Release, Indemnity, and Warranty Agreement" which provided in part as follows:

> Received of Connie C. Richards, Leslie S. Richard, and State Farm Mutual Automobile Insurance Company the sum of Ten Thousand and no/100 ($10,000.00) Dollars, in consideration of which the undersigned Newell W. Griffin releases and discharges the said parties from any and all claims resulting from the automobile accident of 29 June 1970 . . . .
>
> * * * *
>
> As an inducement for State Farm Mutual Automobile Insurance Company to pay him its policy limit of Ten Thousand and no/100 ($10,000.00) Dollars, for bodily injury to one person under the terms of its automobile liability policy issued to

> Leslie S. Richard, and as a further consideration for such payment, Newell W. Griffin hereby agrees to indemnify and protect State Farm Mutual Automobile Insurance Company and hold it harmless, against any workers' compensation subrogation claim, or claim for damages, or other claims, that may be asserted against State Farm Mutual Automobile Insurance Company by Newell W. Griffin's employer and/or the workmens compensation insurer of said employer . . . .

Universal Underwriters did not learn of the execution of this instrument until sometime in June 1971. Thereafter, on June 29, 1971, it notified plaintiff of its intention to suspend compensation benefits, and on July 14, 1971, it requested the Industrial Accident Board to grant a suspension of compensation benefits on the basis of Texas Revised Civil Statutes Art. 8307, sec. 6a., which provides in part as follows:

> Sec. 6a. Where the injury for which compensation is payable under this law was caused under circumstances creating a legal liability in some person other than the subscriber to pay damages in respect thereof, the employe' may at his option proceed either at law against that person to recover damages or against the association for compensation under this law, but not against both, and if he elects to proceed at law against the person other than the subscriber, then he shall not be entitled to compensation under this law. If compensation be claimed under this law by the injured employe' or his legal beneficiaries, then the association shall be subrogated to the rights of the injured employe'. . . .

Plaintiff made demand upon Universal Underwriters for resumption of compensation benefits, which was denied, and on July 27, 1971, plaintiff filed this suit against Universal for benefits under the Louisiana statute which is of course more favorable to plaintiff's position than the Texas statute

quoted above. On August 18, 1971, the Texas Industrial Accident Board rendered a final award stating:

> The Board finds that by reason of said Release, Indemnity and Guaranty Agreement with the Third Party, said employee has made a final election, and all additional claims for benefits under the Texas Workmen's Compensation Act are denied.

The plaintiff and his attorney were both individually furnished with a copy of this final award and notified of the right to "appeal therefrom within 20 days from the date of this final award." No appeal was taken within the stipulated time, the award became final, and defendant filed in this suit a peremptory exception of res judicata based upon that final award.

Defendant relies primarily upon the decision of the United States Supreme Court in Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 64 S.Ct. 208 (1943), wherein the Court stated:

> The question for decision is whether, under the full faith and credit clause, Art. IV, § 1 of the Constitution of the United States, an award of compensation for personal injury under the Texas Workmen's Compensation Law, Title 130 of the Revised Civil Statutes of Texas, Vernon's Ann.Civ.St. art. 8306 et seq., bars a further recovery of compensation for the same injury under the Louisiana Workmen's Compensation Law, Title 34, Chapter 15 of the Louisiana General Statutes, Act No. 20 of 1914, as amended.

Chief Justice Stone, speaking for the majority, answered in the affirmative. Justices Black, Douglas, Murphy and Rutledge dissented.

The factual background in Magnolia is succinctly set forth in Justice Black's dissenting opinion as follows:

> The respondent Hunt is a resident of Louisi-

ana, employed in that state by the petitioner and sent by the petitioner to do work in Texas. While in Texas he was seriously injured in the course of his employment. Confined to a hospital he was told that he could not recover compensation unless he signed two forms presented to him. As found by the Louisiana trial judge there was printed on each of the forms "in small type" the designation "Industrial Accident Board, Austin, Texas." To get his compensation Hunt signed the forms and the Texas insurer began to pay. Returning to his home in Louisiana Hunt apparently discovered that his interests would be more fully protected under Louisiana Law and notified the insurer of an intention to claim under the statute of that state. The insurer immediately stopped payment to him and notified the Texas Board to that effect. Four days later, without any request from Hunt, the Board notified him at his Louisiana home that a hearing would be held in Texas within two and a half weeks "to determine the liability of the insurance company" under Texas law. Hunt did not participate in that proceeding. The Texas Board thereafter made an award to him which, under the law of Texas, was equivalent to a judgment against the insurer. Before the Texas award became final Hunt, who had declined to accept any money under it, filed suit against his employer in the courts of Louisiana under the Workmen's Compensation Law of Louisiana. He recovered a judgment for a substantially larger sum than had been allowed him under the Texas award, from which the Louisiana court deducted the sum he had already received from the Texas insurer. (320 U.S. at pages 450-451, 64 S.Ct. at page 219).

There does not appear to be any significant factual difference between Magnolia and the present case. Counsel for plaintiff strenuously argues that his client took no affirmative action seeking compensation under Texas law and that he was not aware of the fact that the compensation benefits

and medical payments received by him were being made in accordance with the proceedings initiated by the insurer of his employer before the Industrial Accident Board. But neither was Hunt, the employee in Magnolia, aware of the fact that the two forms presented to him for his signature were documents prepared by the Industrial Accident Board. In neither case did the employee participate in the proceedings before the Board and in both instances the employee filed suit in Louisiana before the Texas award became final.

The facts here are even stronger against the plaintiff's position that in Magnolia where the Texas award was invoked to defeat recovery in Louisiana by a resident of Louisiana who had been employed in Louisiana. Here the plaintiff is a resident of the state of Texas who was employed in Texas by a Texas corporation and now seeks to avail himself of the more liberal benefits afforded under the Louisiana statute solely on the basis of the fact that Louisiana is the situs of the accident.

There can be no doubt that Texas had jurisdiction to render a final award involving a resident of Texas who was employed in Texas by a Texas corporation notwithstanding the fact that the injury was received outside of the state. Texas Revised Civil Statutes Art. 8306, sec. 19, provides as follows:

> Sec. 19. If an employee, who has been hired in this State, sustain injury in the course of his employment he shall be entitled to compensation according to the Law of this State even though such injury was received outside of the State . . . .
>
> * * * *
>
> Providing that such injury shall have occured within one year from the date such injured employee leaves this State; and provided, further, that no re-

> covery can be had by the injured employee hereunder in the event he has elected to pursue his remedy and recovers in the state where such injury occurred.

Counsel for plaintiff points to the last quoted paragraph as evidencing an intention on the part of the Texas legislature to permit an injured employee to elect to pursue his remedy and recover in the state where the injury occurs. This is not however precisely what the statute says. It is couched in terms of preventing double recovery, not in terms of granting to the injured employee an exclusive right to elect the forum. It does not purport to deny to the employer the right to a determination of liability under Texas law. In Magnolia the Court construed the statute in light of its legislative history as follows:

> The Texas Court of Civil Appeals formerly held that a Texas employee could recover compensation of his Texas employer for an injury in another state for which he had already recovered compensation in that state. Texas Employers' Ins. Ass'n. v. Price, Tex.Civ.App., 300 S.W. 667. But in declining to review the case, the Texas Supreme Court expressly pointed out that this ruling had not been challenged, and that it was leaving the question undecided, 300 S.W. 672. The right of a second recovery in such circumstances was promptly abolished by statute. Revised Civil Statutes, Art. 8306, § 19. (320 U.S. at page 435, 64 S.Ct. at page 212).

The majority opinion of Chief Justice Stone concluded:

> The remedies afforded to respondent by the Texas and Louisiana Workmen's Compensation Laws are . . . rendered mutually exclusive by the Texas judgment and the full faith and credit clause. The Texas award, being a bar to any further recovery of compensation for respondent's injury, is, by virtue of the full faith and credit clause, exclusive of his

> remedy under the Louisiana Act. (320 U.S. at page 442, 64 S.Ct. at page 215).

Justice Black in his dissenting opinion took the contrary view:

> Plainly this . . . statute pertains only to the right of recovery under Texas law; it does not purport to affect rights under the laws of other states. Nor does it proceed on any theory of res judicata for if an employee fails to recover in the other state he can nevertheless recover an award in Texas. (320 U.S. at page 454, 64 S.Ct. at page 221).

Counsel for plaintiff however cites and relies upon the later case of Carroll v. Lanza, 349 U.S. 408, 75 S.Ct. 804 (1955), where Carroll, a resident of Missouri employed in Missouri while receiving compensation payments under Missouri law for an injury sustained in Arkansas was permitted to maintain an action for commonlaw damages under Arkansas law notwithstanding the fact that the Missouri Act provided that the rights and remedies granted hereunder "shall exclude all other rights and remedies . . . at common law or otherwise." In reversing a contrary opinion by the Court of Appeals, the Supreme Court through Justice Douglas for the majority with Justices Frankfurter, Butler, and Harlan dissenting, said:

> The Court of Appeals thought Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 64 S.Ct. 208, 88 L.ed. 149, to be controlling. There the employee having received a *final award* for compensation in the forum of the injury returned to his home State and sued to recover under its Compensation Act. We held that the latter suit was precluded by the Full Faith and Credit Clause. But here there was no final award under the Missouri Act. Under that Act the statutory payments apparently start automatically on receipt of notice of the injury. Mo.Rev.Stat. 1949. § § 287.380, 287.400, V.A.M.S. While provision is made for an adjudication of disputes between an

> employee and his employer (i.d., § § 287.400, 287.-450), no adjudication was sought or obtained here. (349 U.S. at pages 410-411, 75 S.Ct. at page 806).

The two cases are obviously distinguishable in that in Carroll there was no final award as in Magnolia and hence no basis for a plea of res judicata. Carroll did not purport to either overrule or modify Magnolia. Even if it be conceded that Carroll represents an exception to Magnolia, the exception does not fit the facts here as it would only if (1) there had been no final award in Texas, and (2) this were an action against the third party, Richard, and his insurer, State Farm, rather than a demand for further compensation from Universal Underwriters. This court is powerless to grant or extend an exception to the full faith and credit clause, that being the exclusive province of the United States Supreme Court. As Chief Justice Stone said in Magnolia:

> Even though we assume for present purposes that the command of the Constitution and the statute is not all-embracing, and that there may be exceptional cases in which the judgment of one state may not override the laws and policy of another, this Court is the final arbiter of the extent of the exceptions. (320 U.S. at page 438, 64 S.Ct. at page 213).

This court is in accord with the views expressed in the dissenting opinion of Justice Black in Magnolia. Were it my prerogative to do so I would overrule Magnolia or at least restrict its application to those instances where an employee, knowing of two remedies which purport to be mutually exclusive, knowledgably chooses one as against the other and is thereafter precluded from a second choice. But recognizing the supremacy of the Supreme Court of the United States as the "final arbiter" in these conflict of laws problems I have no choice but to apply the rule of Magnolia, sustain the defendant's plea of res judicata, and dismiss the plaintiff's suit at his costs.

APPENDIX B

NEWAL W. GRIFFIN	STATE OF LOUISIANA
VERSUS	COURT OF APPEAL
UNIVERSAL UNDERWRITERS	FIRST CIRCUIT
INSURANCE COMPANY	NO. 8975

ON APPEAL FROM THE TWENTY-THIRD JUDICIAL DISTRICT COURT WITHIN AND FOR THE PARISH OF ASCENSION, HONORABLE PENROSE ST. AMANT, JUDGE

BEFORE: LANDRY, ELLIS AND TUCKER, JJ.

TUCKER, J.

This suit involves a workmen's compensation action for total and permanent disability sustained by plaintiff-appellant due to injuries received in an accident on June 29, 1970, on U. S. Highway 61, in Ascension Parish, State of Louisiana, when the truck which plaintiff was driving was struck by an automobile owned by Leslie S. Richard, and driven by his wife Connie C. Richard, said automobile being insured by State Farm Mutual Automobile Insurance Company. Plaintiff's injuries required him to be hospitalized at the Baton Rouge General Hospital for four and one-half months following the accident, and he has remained in the care of a Baton Rouge orthopedist, Dr. Allen Jackson, ever since the accident.

Plaintiff, a resident of and domiciled in Houston, Texas, was employed as a truck driver in Houston, Texas, by Keller Industries, Inc., a Houston corporation whose president was Marvin Keller, plaintiff's stepson. Keller Industries, Inc. as a member of Motor Truck Owners Conference, Inc., of Kansas City, Missouri, was covered by a workmen's compensation policy issued by Universal Underwriters Insurance Company, also of Kansas City, Missouri, which, according to the "Certificate of Insurance" issued by Universal Underwriters to

Keller Industries, Inc., protects all of its members and employees in accordance with the "Workmen's Compensation Benefits applicable in each state."

The accident in which plaintiff was injured was routinely reported by Motor Truck Owners Conference, Inc., to Universal Underwriters which, under date of July 21, 1970, made a "Report of Initial Payment of Compensation" to the Industrial Accident Board of the State of Texas. On July 31, 1970, the Texas Industrial Accident Board established a file on plaintiff's claim and sent Universal Underwriters a letter so stating. The Industrial Accident Board directed correspondence to the plaintiff requesting him to direct all future correspondence regarding this claim to the Industrial Accident Board. There is no proof, however, that the plaintiff actually received this notice, nor that he ever directed any claim for compensation or other similar form to the Industrial Board, or signed any such form used by the Board. Universal Underwriters began to pay plaintiff at the rate of Forty-nine and no/100 ($49.00) Dollars per week, on June 29, 1970, and continued to make payments to plaintiff for fifty-one (51) weeks, and all of these payments were accepted by plaintiff, plus a payment of Eighteen Thousand Six Hundred Eighty-one and 62/100 ($18,681.62) Dollars for medical expenses.

On April 22, 1971, while still receiving compensation payments from Universal Underwriters, and without any notification to Universal, the plaintiff and his attorney executed at Houston, Texas, an instrument entitled: "Release, Indemnity, and Warranty Agreement", which provided in part as follows:

> "Received of Connie C. Richard, Leslie S. Richard, and State Farm Mutual Automobile Insurance Company the sum of Ten Thousand no/100 ($10,000.00) Dollars, in consideration of which the undersigned

Newell W. Griffin releases and discharges the said parties from any and all claims resulting from the automobile accident of 29 June 1970.....

* * * * * *

"As an inducement for State Farm Mutual Automobile Insurance Company to pay him its policy limit of Ten Thousand and no/100 ($10,000.00) Dollars, for bodily injury to one person under the terms of its automobile liability policy issued to Leslie S. Richard, and as a further consideration for such payment, Newell W. Griffin hereby agrees to indemnify and protect State Farm Mutual Automobile Insurance Company and hold it harmless, against any workers' compensation subrogation claim, or claim for damages, or other claims, that may be asserted against State Farm Mutual Automobile Insurance Company by Newell W. Griffin's employer and/or the workmens compensation insurer of said employer * * * * * *"

Universal Underwriters did not learn of the execution of this instrument until sometime in June 1971. Thereafter, on June 29, 1971, it notified plaintiff of its intention to suspend compensation benefits, and on July 14, 1971, it requested the Industrial Accident Board to grant a suspension of compensation benefits on the basis of Texas Revised Civil Statutes Art. 8307, sec. 6a., which provides in part as follows:

"Sec. 6a. Where the injury for which compensation is payable under this law was caused under circumstances creating a legal liability in some person other than the subscriber to pay damages in respect thereof, the employé may at his option proceed either at law against that person to recover damages or against the association for compensation under this law, but not against both, and if he elects to proceed at law against the person other than the subscriber, then he shall not be entitled to compen-

> sation under this law. If compensation be claimed under this law by the insured employé or his legal beneficiaries, then the association shall be subrogated to the rights of the injured employé * * * * *"

Plaintiff made demand upon Universal Underwriters for resumption of compensation benefits, which was denied, and on July 27, 1971, plaintiff filed the instant suit against Universal for workmen's compensation benefits under the Louisiana statute, which provides compensation for total and permanent disability for 500 weeks instead of 400 weeks as provided in Texas, and which also permits the injured employee to proceed against both the third party who caused the injury, as well as against the employer's insurer for workmen's compensation benefits. In his suit plaintiff asked that credit be given for workmen's compensation and medical payments already made, and that he be awarded statutory penalties on all sums owing, due to defendant's arbitrary refusal to make further payment after June 29, 1971, and for attorney fees and interest as provided by law from the date of judicial demand, plus all costs.

On August 18, 1971, the Texas Industrial Accident Board rendered a final award stating:

> "The Board finds that by reason of said Release, Indemnity and Guaranty Agreement with the Third Party, said employee has made a final election, and all additional claims for benefits under the Texas Workmen's Compensation Act are denied."

The plaintiff and his attorney were both individually furnished with a copy of this final award and notified of the right to "appeal therefrom within 20 days from the date of this final award." No appeal was taken within the stipulated time, and the award became final.

Meanwhile plaintiff, on August 6, 1971, had set a pre-trial conference on the Louisiana suit for August 27, 1971. On August 18, 1971, defendant filed a peremptory exception of no right or cause of action based on the payments being made to plaintiff under Texas contract, according to Texas Industrial Board Claim, File No. X63541-H; and also a dilatory exception of prematurity based on the action pending in Texas in regard to the compromise settlement and release of liability plaintiff had effected with some one other than the subscriber and his insurer, which allegedly impaired defendant's right of recovery against the tortfeasor herein. The pre-trial conference date was later moved to September 22, 1971, to give time for an appeal from the final determination of the Texas Industrial Accident Board. When none was made within 20 days of the final award, defendant, on September 15, 1971, filed a peremptory exemption of *res judicata* citing the final award of plaintiff's claim by the Texas Industrial Accident Board.

On December 9, 1971, the trial judge pretermitted argument on defendant's other exceptions and restricted argument to his exception of *res judicata*, giving defendant judgment on this peremptory exception and dismissing plaintiff's suit at his cost. Plaintiff's motion for a new trial was denied subsequently and plaintiff has appealed, alleging error by the trial court in dismissing his suit and upholding defendant's peremptory exception of *res judicata*, when he allegedly never filed a claim for workmen's compensation in Texas and allegedly knew nothing of the file in his name held by the Texas Industrial Accident Board until he effected the compromise settlement with the third party tortfeasor. Plaintiff alleges error by the trial judge, also, in concluding that defendant had the right to treat plaintiff's workmen's compensation payments as being made pursuant to the law of Texas, when the contract documents binding defendant obligate it

to make workmen's compensation payments in accordance with the law of the state in which the van line was domiciled, which is the State of Georgia in this case, inasmuch as the truck being operated by plaintiff at the time of the accident was under lease to U. S. Van Lines, Inc., of Atlanta, Georgia.

In his well-written reasons for judgment the trial judge based his decision primarily upon the analogous case of *Magnolia Petroleum Co. v. Hunt*, 320 U. S. 430, 64 S. Ct. 208 (1943). In that case a Louoisiana resident was employed in Louisiana, but was sent to work in Texas where he was injured. He made claim for workmen's compensation under the Texas statute while in the hospital there. Payment was begun. When he returned home to Louisiana, he apparently discovered that his benefits would be greater in Louisiana, and notified the insurer of his intention to claim payment under Louisiana law. The insurer notified the Texas Industrial Accident Board and immediately stopped payment to plaintiff. Four days later the Texas Industrial Board notified plaintiff at his Louisiana home that a hearing would be held in Texas within two and a half weeks to determine the liability under Texas law. Plaintiff Hunt did not participate in these proceedings. Before the judgment denying him further payment became final, he filed suit against his employer in Louisiana under the Louisiana Workmen's Compensation law. He recovered a substantially larger sum than had been awarded him in Texas, subject to the deduction of the Texas payments. In the course of appealing the judgment, however, Magnolia Petroleum Company's plea of *res judicata* was upheld, and Louisiana was ordered to give full faith and credit to the final award of the Texas Industrial Accident Board.

There can be no doubt that Texas had jurisdiction to adjudicate the subject plaintiff's workmen's compensation claim under Tex. Rev. Civ. Stat., Art. 8306, Sec. 19. Moreover, plaintiff is a Texas domiciliary, employed in Texas by

a Texas company. The only point of contact with Louisiana in the present case is the mere fact that the accident happened on a Louisiana highway. Although this fact is sufficient to give Louisiana jurisdiction under the Louisiana Workmen's Compensation Act (R.S. 23:1313), Texas has far more reason to protect the interests of the plaintiff than Louisiana, and far more reason to protect the plaintiff's interests in this case than was the situation in the *Magnolia Petroleum Co.* case. This is not the issue in this case however. As so cogently oboserved in part by Chief Justice Stone in the *Magnolia Petroleum Co.* case:

"* * * * * * *

> Here both Texas and Louisiana have undertaken to adjudicate the rights of the same parties arising from a single injury sustained in the course of employment under the same contract. Each state has awarded to respondent compensation for that injury. But whether the Teaxs award purported also to adjudicate the rights and duties of the parties under the Louisiana law or to control persons and courts in Louisiana is irrelevant to our present inquiry. For Texas is without power to give extraterritorial effect to its laws. See New York Life Ins. Co. v. Head, 234 U.S. 149, 34 S. Ct. 879, 58 L. Ed. 1259; Home Insurance Co. v. Dick, 281 U. S. 397, 50 S. Ct. 338, 74 L. Ed. 926, 74 A.L.R. 701. *The significant question in this case is whether the full faith and credit clause has deprived Louisiana of the power to deny that the Texas award has the same binding effect on the parties in Louisiana as it has in Texas.* (Emphasis added.)
>
> It is not, as the state court thought, a sufficient answer to the bar of the Texas award to assert that Louisiana has a recognized interest in awarding compensation to Louisiana employees who are injured out of the state, see Alaska Packers Ass'n v. Industrial Accident Commission, supra, for Texas, the

state in which the injury occurred, has a like interest in making an award, see Pacific Employers Insurance Co. v. Industrial Accident Commission, supra. And in each of the cases we have cited, the state to which the judgment was brought had an interest in the subject matter of the suit and a public policy contrary to that of the state in which the judgment was obtained. * * * * *

In each of these cases the words and purpose of the full faith and credit clause were thought to demand that the interest of the state in which the judgment was obtained and was res judicata, should override the laws and policy of the forum to which the judgment was taken. And we can perceive no tenable ground for saying that a compensation award need not be given the same effect as res judicata in another state as it has in the state where rendered.

Such was the decision of this court in Chicago, R.I. & P.R. Co. v. Schendel, supra, in which recovery of an award of compensation under the Iowa Workmen's Compensation Act was held to bar recovery in a suit against the employer in Minnesota to recover for the same injury under the Federal Employers' Liability Act, 45 U.S.C.A. 51 et seq. Both sides (sic) had, as in this case, allowed recovery, as they were free to do but for the full faith and credit clause. This Court held that the employee, having had his remedy by the judgment in Iowa, was precluded by the full faith and credit clause from pursuing a remedy for his injury in another state. The remedies afforded to respondent by the Texas and Louisiana Workmen's Compensation Laws are likewise rendered mutually exclusive by the Texas judgment and the full faith and credit clause. The Texas award, being a bar to any further recovery of compensation for respondent's injury, is, by virtue of the full faith and credit clause, exclusive of his remedy under the Louisiana Act.

It lends no support to the decision of the Louisiana court in this case to say that Louisiana has chosen to be more generous with an employee than Texas has. Indeed no constitutional question would be presented if Louisiana chose to be generous to the employee out of the general funds in its Treasury. But here it is petitioner who is required to provide further payments to respondent, contrary to the terms of the Texas award, which, if the full faith and credit clause is to be given any effect, was "a conclusive determination between the parties that petitioner should be liable for no more than the amount of the Texas award. For this reason it is not enough to say that a practical reconciliation of the interests of Texas and Louisiana has been effected by the Louisiana court. There has been no reconciliation of the liability established by the Louisiana judgment with the rights conferred on petitioner by the Texas award and the full faith and credit clause.

* * * * *

Whether the proceeding before the State Industrial Accident Board in Texas be regarded as a 'judicial proceeding', or its award is a 'record' within the meaning of the full faith and credit clause and the Act of Congress, the result is the same. For judicial proceedings and records of the state are both required to have 'such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken'.

* * * * *

Respondent's injury in Texas did not give rise to two causes of action merely because recovery in each state is under a different statute, or because

each affords a different measure of recovery[1]. Chicago, R.I. & P.R. Co. v. Schendel, supra; Baltimore S.S. Co. v. Phillips, 274 U. S. 316, 47 S. Ct. 600, 71 L. Ed. 1069; see Wabash R. Co. v. Hayes, 234 U. S. 86, 90, 34 S. Ct. 729, 730, 58 L. Ed. 1226. The grounds of recovery are the same in one state as in the other—the injury to the employee in the course of his employment. The whole tendency of our decisions under the full faith and credit clause is to require a plaintiff to try his whole cause of action and his whole case at one time. He cannot split up his claim and 'a fortiori, he cannot divide the grounds of recovery.' United States v. California & O. Land Co., 192 U. S. 355, 358, 24 S. Ct. 266, 267, 48 L. Ed. 476. Respondent was free to pursue his remedy in either state but, having chosen to seek it in Texas, where the award was res judicata, the full faith and credit clause precludes him from again seeking a remedy in Louisiana upon the same grounds. The fact that a suitor has been denied a remedy by one state because it does not afford a remedy for the particular wrong alleged, may not bar recovery in another state which does provide a remedy. See Troxell v. Delaware, L. &. W. R. Co., 227 U. S. 434, 33 S. Ct. 274, 57 L. Ed. 586; cf. Ash Sheep Co. v. United States, 252 U. S. 159, 170, 40 S. Ct. 241, 244, 64 L. Ed. 507. But as we decided in the Schendel case it is a very different matter to say that recovery can be had in every state which affords a remedy.

The suggestion that there is a second and different cause of action in Louisiana, merely because Louisiana law authoriezs compensation, and in a different measure than does Texas, or because the jurisdiction of the court of one state depends on the place of the injury and that of the other on the place

1. Any implication to the contrary in Troxell v. Delaware, L. & W. R. Co., 227 U. S. 434, 33 S. Ct. 274, 57 L. Ed. 586, must be considered as overruled by Wabash R. Co. v. Hayes, 234 U. S. 86, 90, 34 S. Ct. 729, 730, 58 L. Ed. 1226; cf. Baltimore S. S. Co. v. Phillips, 274 U. S. 316, 323, 47 S. Ct. 600, 603, 71 L. Ed. 1069.

of the employment contract, would if accepted prove too much. Apart from the demands of full faith and credit, recovery in a transitory action for injury to person or property, whether in tort or for "compensation, can of course only be had in conformity to the law of the state where the action is maintained. Even where the state of the forum adopts and applies as its own the law of the state where the injury was inflicted, the extent to which it shall apply in its own courts a rule of law of another state is itself a question of local law of the forum. Finney v. Guy, 189 U.S. 335, 23 S.Ct. 558, 47 L. Ed. 839; Klaxon Co. v. Stentor Electric Co., supra, 313 U.S. at pages 496,497, 61 S. Ct. at pages 1021,1022, 86 L.Ed. 1477; cf. Worcester County T. Co. v. Riley, 302 U.S. 292, 299, 58 S. Ct. 185, 188, 82 L.Ed. 268.

* * * * *

If an employee employed in one state but injured in another has a different cause of action for compensation in each state because each has its own compensation statute, it could as well be argued in any case where plaintiff has recovered a judgment in one state, and seeks a second recovery in a second state for the same injury, that he is suing upon a second and different cause of action. But it has never been thought that an actionable personal injury gives rise to as many causes of action as there are states whose laws will permit a suit to recover for the injury or that despite the full faith and credit clause the injured person, more than one entitled to recover for breach of contract, could go from state to state to recover in each damages or compensation for his injury. A judgment in tort or in contract is not immune from the requirement of full faith and credit because the successful plaintiff could have maintained his suit under the law of other states and have secured a larger recovery in some, or because the jurisdiction of the court in one state to hear the cause may depend upon some facts dif-

> ferent from the facts necessary to sustain the jurisdiction in another. Cf. Baltimore S.S. Co. v. Phillips, supra; Eldred v. Michigan Ins. Bank, 17 Wall. 545, 21 L. Ed. 685; Wabash R. Co. v. Hayes, supra; Kenney v. Supreme Lodge, supra. And we cannot say that a workmen's compensation award for injury stands on any different footing. In fact Chicago, R. I. & P. R. Co. v. Schendel, supra, held that it did not and we see no reason to depart from its ruling.
>
> Reversed."

BUT says plaintiff's counsel, the Magnolia Petroleum Co. decision was predicated upon the plaintiff's having exercised a choice in the selection of his jurisdiction for suit or claim, and in the instant case the plaintiff had no choice and never made a selection until he filed this suit in Louisiana on July 27, 1971. Plaintiff seeks to reinforce his claim by quoting the following Texas statute which he argues reveals the intention of the Texas legislature to give the employee a choice as to where to pursue his remedy:

> "Sec. 19. If an employee, who has been hired in this State, sustain injury in the course of his employment he shall be entitled to compensation according to the Law of this State even though such injury was received outside of the State . . . .
>
> * * * * *
>
> Providing that such injury shall have occured within one year from the date such injured employee leaves this State; and provided, further, that no recovery can be had by the injured employee hereunder in the event he has elected to pursue his remedy and recovers in the state where such injury occurred." (Tex. Rev. Civ. Stat. Art. 8306.)

As pointed out by the trial judge in his reasons for judgment, this Texas statute was not intended to give the em-

ployee an exclusive right to elect the forum, but to prevent double recovery, quoting from a history of the statute given in the Magnolia Petroleum Co. case at 320 U. S. 435, 64 Sup. Ct. 212.

In defense on the point of choice defendant alleges that plaintiff was notified that a file had been opened with the Texas Industrial Accident Board in regard to the accident and injuries herein involved and with respect to the state's compensation system under which he was being paid. Plaintiff denies ever having received any notice, and there is no evidence in the record to substantiate defendant's contention on this score. Nonetheless, we find it most difficult to believe that plaintiff, a Texas domiciliary who had contracted in Texas with a Texas company, could have accepted 51 weekly workmen's compensation payments, plus $18,681.62 medical payments, without his or his attorney's knowledge that they were being paid in accordance with Texas terms and schedules. We consider his acceptance of these payments as tantamount to a choice or selection of the state in which he wished to recover and receive payments on his claim.

Regardless of the conclusions of this court as to plaintiff's choice or lack of choice of forums, this conclusion is irrelevant to a holding of *res judicata* herein. Plaintiff urges strenuously that the *Magnolia Petroleum Co.* decision or *res judicata* was based upon the element of the employee having had a choice of forums, whereas the plaintiff herein allegedly did not. We opine, however, that the decision of the Texas Industrial Accident Board in *Magnolia Petroleum Co.* became *res judicata*, not because plaintiff employee had a choice of forums, but because he had failed to appear at a hearing on the Board's final award, when duly notified of it. He was deemed to have acquiesced in the propriety of this decision, and it became final by his failure to appear. As a *final judgment*, it could be used to oppose future judgments on the

same subject, between the same parties under the doctrine of *res judicata.*

In Louisiana the doctrine of *res judicata* is set forth in Civil Code article 2286 as follows:

> "The authority of the thing adjudged takes place only with respect to what was the object of the judgment. The thing demanded must be the same; the demand must be founded on the same cause of action; the demand must be between the same parties, and formed by them against each other in the same quality."

As is apparent from the above-quoted article ,the use of the doctrine of *res judicata* begins with a "judgment," which is universally understood to be a final judgment. When plaintiff Newall Griffin, after due notification, failed too appear in Texas to protest the action of the Board in discontinuing his payments under Tex. Rev. Civ. Stat., Art. 8307 (6) (a), at which time he could have set forth his arguments concerning his choice of forums, the Board's decision to discontinue payments became final. As a final judgment, it could be interjected in opposition to any other judgments concerning (1) the same demand, (2) deriving from the same cause of action, (3) between the same parties, and (4) formed by them against each other in the same quality. Nowhere is it stated that, for the doctrine of *res judicata* to apply, plaintiff must have had a free choice of forums.

Once the matter of the workmen's compensation payment is adjudged *res judicata,* under the authority of the *Magnolia Petroleum Co.* case quoted extensively above, it must be accorded "full faith and credit" under the U. S. Constitution Art. IV, sec. 1.

We consider that the decision of the Texas Industrial Accident Board became final in regard to plaintiff Newall

Griffin's claim when he received notice of his right to appeal within twenty days from the date of the Board's decision to discontinue his payments on August 18, 1971, and did not do so regardless of the issue of his choice of forums. The instant suit brought in Louisiana contains all the elements for the application of the doctrine of *res judicata* as set forth above. The same parties are involved; the claim for compensation is the same, arising out of the same accident on June 29, 1970, which occurred in Louisiana, and the "quality" of the parties is the same. Griffin's final adjudicaiton on this same workmen's compensation claim in Texas which properly took jurisdiction of the claim must be accorded full faith and credit by the sister state of Louisiana, in reliance upon the holdings of *Magnolia Petroleum Co.o v. Hunt*, cited *supra*. The ruling of the trial judge upholding defendant's exception of *res judicata* and dismissing plaintiff's suit at his costs is correct.

Plaintiff-appellant's second allegation of error; *i.e.*, that the contract documents bind the insurer to make payment according to the law of the state in which the van line is domiciled, and that the van plaintiff was driving at the time of the accident was actually domiciled in Georgia, can be answered very simply by quoting from the Certificate of Insurance issued by Universal Underwriters which states that all of its members and employees are protected in accordance with the workmen's compensation benefits "applicable in each state." This latter quoted segment does not imply any exclusivity of jurisdiction for any state, be it that of the domicile of the van lines, the employer, the employee, or anyone else.

For the reasons set forth above the judgment of the trial court is affirmed at appellant's cost.

AFFIRMED.

APPENDIX C

SUPREME COURT OF LOUISIANA

NO. 53,038

NEWAL W. GRIFFIN

V.

UNIVERSAL UNDERWRITERS INSURANCE COMPANY ON WRIT OF REVIEW TO THE COURT OF APPEAL, FIRST CIRCUIT, PARISH OF ASCENSION STATE OF LOUISIANA

MARCUS, Justice

From a judgment of the First Circuit Court of Appeal,[1] affirming the judgment of the trial court upholding a peremptory exception of res judicata and dismissing plaintiff's suit based on a claim for compensation under the Louisiana Workmen's Compensation Act, the plaintiff applied to this Court, and we granted a writ of review.[2]

The record discloses that plaintiff, Newal W. Griffin, a resident of Houston, Texas, was hired in that city as a truck driver by Keller Industries, Inc. (hereinafter referred to as "Keller"), a corporation organized and domiciled in the State of Texas. Keller, as a member of the Motor Truck Owners Conference, Inc., was covered by a workmen's compensation policy issued by Universal Underwriters Insurance Company (hereinafter sometimes referred to as "Universal"), defendant herein.

Plaintiff was assigned to drive one of the trucks leased by his employer to U. S. Van Lines, Inc. (hereinafter referred to as "Van Lines") of Atlanta, Georgia. On June 29, 1970,

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1. Griffin v. Universal Underwriters Insurance Co., 268 So.2d 702 (La. App. 1972).
2. 271 So.2d 258 (1973).

while so employed, he sustained serious personal injuries resulting from a motor vehicle accident which occurred in Ascension Parish, Louiniana, and was hospitalized in the Baton Rouge General Hospital. Plaintiff notified his employer of the accident who immediately informed the Safety Director of Van Lines who, in turn, informed the defendant. On July 21, 1970, defendant filed a report of the accident and injury with the Texas Industrial Accident Board (hereinafter sometimes referred to as the "Texas Board"). The Texas Board established a file on plaintiff's claim and directed correspondence to him requesting that all future correspondence regarding his claim be made to the Texas Board. There is no proof that plaintiff actually received this notice or that he ever directed any claim for compensation to the Texas Board.

Defendant began to pay plaintiff workmen's compensation at the rate of $49.00 per week, the maximum allowable for permanent disability under both the Texas and Louisiana Workkmen's Compensation laws. Checks covering these payments were mailed to plaintiff by defendant through its agent's local office in Baton Rouge (Crawford & Company). In addition, $18,681.62 in medical expenses were paid by the defendant.

On April 22, 1971, while still receiving compensation payments from defendant, plaintiff settled his tort claim with the third party tortfeasor in the amount of $10,000.00. The settlement was executed at his domicile in Houston, Texas.

Upon learning of this settlement, Universal immediately notified plaintiff of its intention to cease compensation payments and requested the Texas Board to suspend compensation benefits since his election to recover damages against the third party tortfeasor precluded his right to recover com-

pensation under the Texas Workmen's Compensation Act (Vernon's Ann. Civ. St. art. 8307, §6a).

Plaintiff made demand upon defendant for resumption of workmen's compensation benefits which demand was denied, and, on July 27, 1971, plaintiff filed the present suit against Universal for workmen's compensation benefits under the Louisiana statute. On August 18, 1971, the Texas Board rendered a final judgment stating:

> "The Board finds that by reason of the said Release, Indemnity and Guaranty Agreement with the Third Party, said employee has made a final election, and all additional claims for benefits under the Texas Workmen's Compensation Act are denied."

Both plaintiff and his attorney were furnished a copy of this final award and notified of the right to "appeal therefrom within 20 days from the date of this final award." No appeal was taken within the stipulated time, and the award became final. Defendant filed a peremptory exception of res judicata on the ground that plaintiff could not recover in Louisiana on a workmen's compensation claim since Louisiana was required to give full faith and credit to the final award of the Texas Board. The trial court sustained the exception and dismissed plaintiff's suit. The Court of Appeal, in affirming the trial court, concluded that, since the decree of the Texas Board was final, it must be accorded full faith and credit under Article IV, Sec. 1 of the Constitution of the United States, citing Magnolia Petroleum Company v. Hunt, 320 U.S. 430, 64 S.Ct. 208, 88 L.Ed. 149 (1943) as authority.

The sole issue presented for our consideration is what effect did the final award of the Texas Board have on plaintiff's right to claim workmen's compensation benefits under the Louisiana Workmen's Compensation Act.

It is not disputed that both Texas and Louisiana have jurisdiction in regard to the workmen's compensation claim and that the Texas award became final prior to any final award being rendered in Louisiana. Therefore, we would ordinarily be required to give full faith and credit to the Texas award since it was based upon the same demand (workmen's compensation) arising out of the same cause of action (industrial accident on June 29, 1970) between the same parties and formed by them against each other in the same quality (Art. 2286 of the Civil Code). Furthermore, we would also be compelled to agree with the Court of Appeal that the Magnolia decision would be controlling in the instant case, and plaintiff's action would be barred except for the subsequent ruling by the United States Supreme Court in the matter of Industrial Commission of Wisconsin v. McCartin, 330 U.S. 622, 67 S.Ct. 886, 91 L.Ed. 1140 (1947), which decision, together with the Magnolia decision, we will hereinafter discuss.

According to the facts in the Magnolia case, Magnolia Petroleum Company employed Hunt as a laborer in connection with the drilling of oil wells. In the course of his employment, Hunt, a Louisiana resident, who had been employed in Louisiana, was sent to Texas where he was injured. While in the hospital there, he made claim for workmen's compensation under the Texas statute, and payment of benefits was commenced. In connection with his claim for compensation in Texas, he completed and signed certain forms issued by the Texas Industrial Accident Board, which were returned to the Board by him. Upon returning to Louisiana, Hunt decided to claim benefits under the more generous provisions of the Louisiana Workmen's Compensation Act, but, prior to a final decree in Louisiana, the Texas Board rendered a final award. Subsequently, the Louisiana court rendered a judgment in Hunt's favor under the Louisiana Workmen's

Compensation Act, subject to a credit for the Texas award. Upon review, the United States Supreme Court held that Hunt was free to pursue his remedy in either State, but, having chosen to seek it in Texas where the award was res judicata, the full faith and credit clause precluded him from seeking a remedy for the same cause of action in Louisiana. Accordingly, Magnolia's plea of res judicata was upheld, and Louisiana was ordered to give full faith and credit to the final award of the Texas Industrial Accident Board.

Plaintiff argues that the decision in Magnolia does not apply in the present case since plaintiff did not consciously elect to pursue his remedy under the Texas Workmen's Compensation Act. However, as we read the Magnolia case, the fact that plaintiff did or did not elect to pursue his remedy under the Texas Workmen's Compensation Act is of no significance. Rather, the holding of the Supreme Court in Magnolia is predicated on the circumstances where, as here, there is a single cause of action between the same parties brought in two states, both of which had jurisdiction. Therefore, where an award rendered by one state (Texas) has been adjudicated res judicata, the full faith and credit clause deprives the other state (Louisiana) of the power to deny that the Texas award has the same binding effect on the parties in Louisiana as it does in Texas.

Therefore, we find no merit to plaintiff's contention that Magnolia would not be controlling since he did not select the forum. Rather, it is the prior final Texas award on the same cause of action between the same parties that would bar plaintiff's present suit.

However, some four years subsequent to the Magnolia decision, the United States Supreme Court rendered the decision in Industrial Commission of Wisconsin v. McCartin,

supra, which decision was apparently not considered by the Court of Appeal.

The McCartin decision concerns an Illinois employer and employee. The employee drove back and forth between his home in Illinois and his assigned work in Wisconsin. While working in Wisconsin within the course and scope of his employment, the employee suffered an injury. Since the employee was entitled to proceed under the Illinois Workmen's Compensation Act and thereafter claim compensation under the Wisconsin Workmen's Compensation Act, with credit to be given for the amount paid pursuant to the Illinois Act, he elected to proceed initially in Illinois. The employee had included in the settlement agreement a stipulation that the Illinois award would not affect any of his rights under the Wisconsin Workmen's Compensation Act. The stipulation was approved by the Illinois Commissioner and made part of the lump sum settlement award. The Illinois award became final. Subsequently, when the employee applied for workmen's compensation in Wisconsin, both his employer and the insurance carrier resisted the claim contending that, under the full faith and credit clause, the Wisconsin proceedings were barred by the Illinois award; reliance was placed on the Magnolia case which had been just recently decided. On the basis of this decision, the Supreme Court of Wisconsin denied recovery to the plaintiff. On review by the United States Supreme Court, the judgment was reversed. The issue there again was whether the compensation paid under the Illinois statute raised a full faith and credit bar to a subsequent award in Wisconsin for an additional amount.

The Supreme Court did not find the Magnolia case controlling since the Illinois award was different in its nature and effect from the Texas award in the Magnolia case. The Court first quotes the Illinois exclusive coverage clause and shows that it means in Illinois, as it does in practically every

other state, that no other common law or statutory remedy under local law can be sought.

The Court went on to say:

> "But there is nothing in the statute or in the decisions thereunder to indicate that it is completely exclusive, that it is designed to preclude any recovery by proceedings brought in another state for injuries received there in the course of an Illinois employment. [Citing cases] And in light of the rule that workmen's compensation laws are to be liberally construed in furtherance of the purpose for which they were enacted, [citing cases], we should not readily interpret such a statute so as to cut off an employee's right to sue under other legislation passed for his benefit. Only some unmistakable language by a state legislature or judiciary would warrant our accepting such a construction. Especially is this true where the rights affected are those arising under legislation of another state and where the full faith and credit provision of the United States Constitution is brought into play. [Citing cases]
>
> "We need not rest our decision, however, solely upon the absence of any provision or construction of the Illinois Workmen's Compensation Act forbidding an employee from seeking alternative or additional relief under the laws of another state. * * *"

At this point, the Court proceeded to refer to the settlement agreement between the parties which contained the stipulation previously referred to and which had also been approved by the Illinois Industrial Accident Commission. However, the Court went on to say:

> "* * * the reservation spells out what we believe to be implicit in that Act — namely, that an Illinois workmen's compensation award of the type here involved does not foreclose an additional award

> under the laws of another state. And in the setting of this case, the fact is of decisive significance.
>
> "Since this Illinois award is final and conclusive only as to rights arising in Illinois, Wisconsin is free under the full faith and credit clause to grant an award of compensation in accord with its own laws. Magnolia Petroleum Co. v. Hunt, 320 US 430, 88 L ed 149, 64 S Ct. 208, 150 ALR 413, 15 NCCA NS 529, supra, thus does not control this case."

Thus, the Court concludes that the reservation clause was not necessary to its decision in that it only sets forth that which is implicit in the Illinois statute; that is, there is nothing in this statute to indicate it is designed to preclude any recovery for compensaton brought in another state for injury received in the course of Illinois employment.

In the instant case, we must determine whether the Texas Act contains any "unmistakable language" which would foreclose an additional award under the laws of Louisiana. In the first place, the Texas exclusive coverage clause (Vernon's Ann. Civ. St. art. 8306, §3) does not have this effect. As a matter of fact, we do not find it significantly different from that of the Illinois statute. Texas does have an express statutory provision which precludes recovery in Texas when recovery has been first obtained in another state for an out-of-state injury:

> "* * * no recovery can be had by the injured employee hereunder in the event he has elected to pursue his remedy and recovers in the state where such injury occurred."
>
> (Vernon's Ann. Civ. St. art. 8306 §19)

However, we find nothing in this statute or in any other provision of the Texas Workmen's Compensation law that

says that, if the employee first obtains a Texas award for compensation, he shall thereafter be precluded from seeking a successive award in another state, nor have any cases been called to our attention which have so held. Therefore, in accordance with Industrial Commission of Wisconsin v. McCartin, we conclude that the Texas award is final and conclusive only to the rights arising in Texas, and Louisiana is free under the full faith and credit clause to grant an award of compensation in accordance with its own laws, after giving credit for the sums paid under the Texas Act.

For the foregoing reasons, judgment of the Court of Appeal sustaining the exception of res judicata is reversed, and the case is remanded to the trial court with instructions to proceed with this matter consistent with the views set forth herein.

APPENDIX D

NEWAL W. GRIFFIN
VERSUS NO. 17,592
UNIVERSAL
UNDERWRITERS
INSURANCE COMPANY
Filed: Dec. 9, 1971

STATE OF LOUISIANA
PARISH OF ASCENSION
23RD JUDICIAL
DISTRICT COURT
s/ Deputy Clerk
Clerk of Court

JUDGMENT

IT IS ORDERED, ADJUDGED AND DECREED That the peremptory exception of res judicata filed herein by defendant be and the same is hereby maintained and the plaintiff's suit dismissed at his costs.

JUDGMENT READ, RENDERED AND SIGNED In Open Court at Donaldsonville, Parish of Ascension, Louisiana, this 9th day of December, 1971.

s/ Penrose C. St. Amant
Judge

APPENDIX E

NEWAL W. GRIFFIN	NUMBER: 17,592
VERSUS	DIVISION "C"
UNIVERSAL	23RD JUDICIAL
UNDERWRITERS	DISTRICT COURT
INSURANCE COMPANY	PARISH OF ASCENSION
	STATE OF LOUISIANA

JUDGMENT

This cause came on plaintiff's application for a new trial on January 18, 1972 pursuant to regular assignment. Present were Paul H. Due', counsel for plaintiff and Kenneth E. Barnette, counsel for defendant. The Court considering the entire record of these proceedings, and the argument of counsel and for reasons this day orally assigned;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendant and against plaintiff, overruling plaintiff's application at his costs.

JUDGMENT RENDERED this the 18th day of January, 1972.

JUDGMENT READ AND SIGNED this the 21st day of January, 1972 at Donaldsonville, Louisiana.

s/ Penrose C. St. Amant
Judge

APPENDIX F

SUPREME COURT OF LOUISIANA

NEW ORLEANS, 70112

FOR IMMEDIATE NEWS RELEASE

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the 26th day of October, 1973, the following action was taken by the Supreme Court of Louisiana in the cases listed below:

REHEARINGS REFUSED:

53,038 Griffin v. Universal Underwriters

SUPREME COURT, U. S.

FILED

MAR 7 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-958

NEWAL W. GRIFFIN,

Respondent,

versus

UNIVERSAL UNDERWRITERS INSURANCE COMPANY,

Petitioner.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

Paul H. Dué of
DUÉ AND DODSON
442 Europe Street
Baton Rouge, Louisiana 70802

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Carroll vs. Lanza, 349 U.S. 408, 75 Sup. Ct. 804, 806 (1955) 5, 6, 8, 32a

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

No. 73-958

NEWAL W. GRIFFIN,
Respondent,

versus

UNIVERSAL UNDERWRITERS INSURANCE COMPANY,
Petitioner.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

Respondent, Newal W. Griffin, presents to the Court this brief in opposition to the petition for a writ of certiorari to the Supreme Court of the State of Louisiana filed by petitioner, Universal Underwriters Insurance Company.

STATEMENT OF FACTS

Respondent, Newal W. Griffin, essentially agrees with the presentation of statement of facts made by petitioner herein, with the following exceptions.

Petitioner has failed to mention in its statement of facts the express finding by the Louisiana Supreme Court that, "There is no proof that plaintiff actually received this notice [a piece of correspondence allegedly sent to plaintiff's Texas residence by the Texas Industrial Accident Board] or that he [respondent] ever directed any claim for compensation to the Texas Board." *Griffin v. Universal Underwriters Insurance Company*, 283 So.2d 748, 749 (La. Sup. Ct. 1973).

Similarly, respondent takes issue with the statement contained on page 7 of petitioner's petition to the effect that the Texas Industrial Accident Board ruling could not be "collaterally attacked by filing *another suit* for workmen's compensation benefits in the State of Louisiana" (emphasis added). The inference drawn therefrom is in conflict with the express findings of fact by the Louisiana courts negating the filing by respondent of any type of claim whatsoever in Texas or in anywise participating actually or constructively in such proceedings. Per contra, the first and only suit ever filed was that filed by respondent in Louisiana on July 27, 1971, or some three weeks before the Texas Industrial Accident Board took its unilateral action on August 18, 1971, without any prior notice to respondent.

REASONS FOR DENYING THE WRIT

Petitioner argues that the disposition of this litigation by the Louisiana Supreme Court conflicts with this Court's holding in *Magnolia Petroleum Company v. Hunt*, 320 U.S. 430, 64 S.Ct. 208, 88 L.Ed. 149 (1943).

It is respectfully submitted that petitioner is in this regard in error, and that the instant litigation is readily factually distinguishable from the fact situation which obtained in the *Hunt* case.

In this connection, respondent respectfully incorporates as Appendix I, pertinent excerpts from his original brief filed with the Supreme Court of Louisiana, and particularly directs this Court's attention to the factual distinctions between the instant case and the *Hunt* case demonstrated in conjunction with Argument On Assignment Of Error Number 5 (Appendix I, p. 19a). A review of both the intermediate Louisiana appellate court's opinion in *Hunt v. Magnolia Petroleum Company* as well as this Court's opinion in *Magnolia Petroleum Company v. Hunt* readily discloses that plaintiff Hunt actively initiated a claim for compensation pursuant to the law of the State of Texas, and only after having made such an election of remedy did plaintiff Hunt then seek to revoke his election of remedies and attempt to pursue a subsequent claim for workmen's compensation benefits in Louisiana. This Court clearly mentions in its opinion in *Magnolia Petroleum Company v. Hunt* that plaintiff Hunt was free to pursue his remedy either in Texas or in Louisiana, but having first chosen to pursue such compensation claim in Texas, he was bound by such choice of forums and concomitant election of remedies, and could not thereafter with impunity disregard the Texas proceedings and file another claim in Louisiana.

Such is clearly not the case with regard to respondent Griffin herein, but on the contrary, respondent

Griffin initiated one and only one claim for compensation benefits, and that was his instituted suit in the Louisiana trial court for Ascension Parish.

Such a factual distinction was recognized by the Louisiana Court of Appeal for the Third Circuit in *Ryder v. Insurance Company of North America*, 282 So.2d 771 (La. App. 3d Cir. 1973), which decision was handed down on September 18, 1973, and thus before disclosure of the Louisiana Supreme Court's decision in the instant case which was handed down on September 24, 1973 (see 283 So.2d at 748). In *Ryder*, the Louisiana appellate court correctly recognized the fact this Court's decision in *Magnolia Petroleum Company v. Hunt* was factually inapposite, viz.

> "[4] *It is quite evident that it was the EMPLOYER AND INSURER who obtained the decision from the Georgia Workmen's Compensation Board, and it should be pointed out that this was only after plaintiff's counsel was insisting on his rights to benefits under the Louisiana law, as suit had been filed under the Louisiana law. Plaintiff himself did not seek a ruling or adjudication before the Georgia Workmen's Compensation Board.* This alone makes the Louisiana doctrine of res judicata inapplicable. Further, the Magnolia case has been severely restricted, and it has been considerably discredited by the case of Industrial Commission v. McCartin, 330 U.S. 622, 67 S.Ct. 886, 91 L.Ed. 1140 (1947). In that case, the United States Supreme Court ruled

> that a judgment awarding compensation would not bar the claimant from seeking additional benefits in another State if the laws of the State granting the first award did not expressly prohibit such additional relief. We are cited to no authority by defendant that the State of Georgia had any prohibition against additional relief. *The Magnolia case is further rendered inapplicable, because in Magnolia, the employee pressed a claim for judgment in the first State. That is not the case here, as has already been pointed out.* It was only after plaintiff obtained Louisiana counsel and was insisting on his rights to benefits under Louisiana law, that employer's insurer sought to get a decision of the Georgia Workmen's Compensation Board terminating total disability benefits, and it should be noted here that the Georgia Board found that plaintiff was totally disabled."
> (*Ryder v. Insurance Company of North America*, 282 So.2d at 774 — emphasis added.)

It is for this same reason that petitioner's reliance on *Carroll v. Lanza*, 349 U.S. 408, 75 S.Ct. 804, ____ L.Ed. ____ (1955) is unfounded, inasmuch as this Court in *Carroll v. Lanza* distinguished *Magnolia Petroleum Company v. Hunt* as follows:

> "Nor do we have a case where an employee, knowing of two remedies which purport to be mutually exclusive, chooses one as against the

other and therefore is precluded a second choice by the law of the forum."
Carroll v. Lanza, 75 S.Ct. at 806.

Again, and for the same reasons, petitioner's reliance on *Gasch v. Britton*, 202 F.2d 356 (D.C. Cir. 1952) is unfounded. *Gasch* is again a case where the plaintiff widow first filed a claim for compensation death benefits in Maryland, and after having been awarded all benefits possible under the Maryland Workmen's Compensation Statute, she then sought to file another compensation claim under the Federal Longshoremen and Harbor Workers Compensation Act, which was by Federal statute made the Compensation Act for the District of Columbia. The court held that she was bound by her prior choice of forums on authority of *Magnolia Petroleum Company v. Hunt*, cited supra:

"... Gasch was killed while engaged on a job in Maryland. *His widow, for herself and two minor children, filed claim for death benefits under Maryland's Compensation Law. All allowable benefits were awarded.* After receiving a few payments Mrs. Gasch petitioned the Maryland Commission to vacate the order. The petition was denied and the order affirmed. No appeal was taken from either order and the award became final. *Mrs. Gasch, for herself and the children, followed with a claim before Appellee Britton, Deputy Commissioner for the District of Columbia, for the larger benefits allowed under the District's Compensation Act, subject to credit for the*

> *amount of the Maryland award ...*" (202 F.2d at 357 — emphasis added)

The Federal Appellate Court clearly recognized the issue in the case was whether an employee or his beneficiaries can claim compensation in another jurisdiction *after* having received an award in Maryland, which issue the court resolved adversely to the claimants:

> "... Here the question is, can an employee, or his beneficiaries, claim compensation in another jurisdiction after receiving an award in Maryland? ..." (202 F.2d at 362.)

Petitioner in essence asserts that even though respondent elected to pursue his compensation remedy in Louisiana and filed suit thereon after amicable demand to no avail *before* either respondent or his attorney received any notice whatsoever from the Texas Industrial Accident Board concerning the so-called final award, and in fact *before* this order was ever rendered, for some reason respondent was required to place his Louisiana suit for compensation benefits in abeyance, or possibly even abandon it, and hire another attorney to appear before the Texas Industrial Accident Board or a court of review in Texas or else suffer the consequences of res judicata. This simply cannot be the law. All of the cases clearly show that respondent-employee has the right to elect the forum, which respondent did in this case. Respondent filed his suit for compensation benefits in Louisiana *before*

the Texas Industrial Accident Board took any action whatsoever.

The inequity of petitioner's argument becomes more apparent when we consider the proposition that if petitioner is correct in its reasoning, then petitioner could have elected to institute commission or judicial proceedings in Kansas City, Missouri, the domicile of its named insured and the statutory employer of respondent, or in Georgia, where U. S. Van Lines, Inc. of Atlanta, Georgia, for whom respondent was driving the truck under lease, was domiciled, thus requiring respondent to abandon his chosen compensation claim in Louisiana and seek to protect his interest in Missouri or Georgia.

In the instant litigation respondent exercised his constitutional and valid choice of forum by instituting his claim for compensation benefits in Louisiana before anything was done in Texas. The instant case is, accordingly, for this reason alone, clearly factually distinguishable from that dealt with in this Court in *Magnolia Petroleum Company v. Hunt*, in *Carroll v. Lanza*, and by the District of Columbia Court of Appeal in *Gasch v. Britton*. There is, accordingly, no conflict between the disposition and result reached in the instant litigation by the Louisiana Supreme Court and decisions such as *Magnolia Petroleum Company v. Hunt* and *Carroll v. Lanza* relied on by petitioner, and, accordingly, no basis for granting the petition for certiorari, Rule 19 1(a), Revised Rules of the Supreme Court of the United States.

For the balance of respondent's argument in opposition to the petition for a writ of certiorari, especially the effect of *Industrial Commission v. McCartin*, 330 U.S. 622, 67 S.Ct. 886 (1947), respondent respectfully directs this Court's attention to Appendix I, particularly that part related to Argument On Assignment of Error Number 6, Appendix I, pp. 43a through 49a, and the reproduction therein of the appropriate discussion from Larson's Workmen's Compensation Law, Vol. 3, pp. 369-380, reproduced herein as Appendix "A" to Appendix I, pp. 52a through 67a.

It is submitted that the Louisiana Supreme Court in the instant case correctly concluded that the Texas Workmen's Compensation Act does not contain any "unmistakable language" which would foreclose an additional award under the laws of Louisiana:

> "[2, 3] In the instant case, we must determine whether the Texas Act contains any 'unmistakable language' which would foreclose an additional award under the laws of Louisiana. In the first place, the Texas exclusive coverage clause (Vernon's Ann.Civ.St. art. 8306, § 3) does not have this effect. As a matter of fact, we do not find it significantly different from that of the Illinois statute. Texas does have an express statutory provision which precludes recovery in Texas when recovery has been first obtained in another state for an out-of-state injury:

> "* * * no recovery can be had by the injured employee hereunder in the event he has elected to pursue his remedy and recovers in the state where such injury occurred.' "
> (Vernon's Ann.Civ.St. art. 8306 § 19)

However, we find nothing in this statute or in any other provision of the Texas Workmen's Compensation law that says that, if the employee first obtains a Texas award for compensation, he shall thereafter be precluded from seeking a successive award in another state, nor have any cases been called to our attention which have so held. Therefore, in accordance with Industrial Commission of Wisconsin v. McCartin, we conclude that the Texas award is final and conclusive only to the rights arising in Texas, and Louisiana is free under the full faith and credit clause to grant an award of compensation in accordance with its own laws, after giving credit for the sums paid under the Texas Act."

Griffin v. Universal Underwriters Insurance Company, 283 So.2d at 752.

CONCLUSION

For these reasons, respondent, Newal W. Griffin, prays for a denial of petitioner's writ of certiorari herein.

Respectfully submitted,

Paul H. Dué of
DUÉ AND DODSON,
Attorneys for Respondent
442 Europe Street
Baton Rouge, Louisiana 70802

CERTIFICATE

I hereby certify that a copy of the above and foregoing brief of respondent in opposition to petition for a writ of certiorari to the Supreme Court of the State of Louisiana has been mailed this day, postage prepaid, in compliance with Rule 33 of the Supreme Court of the United States to Mr. A. G. Seale, Post Office Box 15766, Broadview Station, Baton Rouge, Louisiana 70815.

Baton Rouge, Louisiana, this ____ day of March, 1974.

Paul H. Dué

APPENDIX I

SUPREME COURT OF LOUISIANA

No. 53,038

NEWAL W. GRIFFIN

versus

UNIVERSAL UNDERWRITERS INSURANCE COMPANY

WRIT OF REVIEW TO THE COURT OF APPEAL, FIRST CIRCUIT, PARISH OF ASCENSION

ORIGINAL BRIEF ON BEHALF OF NEWAL W. GRIFFIN, PLAINTIFF-APPELLANT IN SUPPORT OF WRIT OF REVIEW

SUPREME COURT OF LOUISIANA

No. 53,038

NEWAL W. GRIFFIN

versus

UNIVERSAL UNDERWRITERS INSURANCE COMPANY

Writ of Review to the Court of Appeal, First Circuit, Parish of Ascension

ORIGINAL BRIEF ON BEHALF OF NEWAL W. GRIFFIN, PLAINTIFF-APPELLANT IN SUPPORT OF WRIT OF REVIEW

JURISDICTION

This Court has jurisdiction of this case by virtue of Certiorari or Writ of Review to the Court of Appeal, First Circuit, issued by this Court on the 15th day of January, 1973.

SYLLABUS

The doctrine of res judicata is stricti juris and cannot be applied unless the party relying thereon proves each essential element of the doctrine beyond all question and proves all necessary facts to warrant its application.

McNeal vs. State Farm Mutual Automobile Insurance Company, ____ La. ____, 278 So.2d 108 (1973);
Eugene vs. Ventress, 253 La. 840, 220 So.2d 94 (1969);
Pacific Finance Company of Caddo vs. Benson, 149 So.2d 239 (La. Appeal 2d Cir. 1963) writ refused, 244 La. 128, 150 So.2d 588;
Road Equipment Company vs. Prestenback, 143 So.2d 135 (La.App. 1st Cir. 1962);
Terrebonne vs. Abadie, 132 So.2d 106 (La.App. 1st Cir. 1961).

Workmen's compensation statutes, being intended to remove the burden of waste of life and limb from working men to their employers, who will distribute it among consumers of their products, are liberally interpreted by the courts in order to give such statutes the full benevolent effect intended by the lawmakers.

Johnson vs. Cabot Carbon Company, 227 La. 941, 81 So.2d 2 (1955);
Brooks vs. Griggs Casing Crews, Inc., 136 So.2d 693 (La.App. 2d Cir. 1961).

More than one workmen's compensation statute can apply to a single compensable injury, so long as each

state has a relevant interest in the case. Successive awards can be made in different states, deducting the amount of the first award from the second. An award already recovered under the workmen's compensation act of one state will not bar a proceeding under the workmen's compensation act of another state, unless the act where the award was made was designed to preclude the recovery of an award under any other workmen's compensation act.

Industrial Commission vs. McCartin, 330 U.S. 622, 67 S.Ct. 886 (1947).

A plaintiff may assert a cause of action in Louisiana under the Louisiana Workmen's Compensation Act where the injury occurs in Louisiana, even though both the employee and the employer are residents of another state and even if the contract of employment was entered into in another state.

Johnson vs. El Dorado Creosoting Company, 71 So.2d 613 (La.App.2d Cir. 1954). See also *Mattel vs. Pittman Construction Company,* 174 So.2d 141 (La.App. 4th Cir. 1965).

MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE

Newal W. Griffin filed suit for workmen's compensation benefits for total and permanent disability in the Trial Court on July 27, 1971, naming as defendant, Universal Underwriters Insurance Company. To plain-

tiff's petition defendant-appellee, Universal Underwriters Insurance Company, filed various exceptions, including a peremptory exception urging res judicata, wherein defendant-exceptor alleged in Paragraph 1 that, "plaintiff filed a claim for workmen's compensation with the Texas Industrial Accident Board." (Record Page 27) Exceptor further alleged that said Board had entered a final award denying plaintiff's right to any additional claims, from which "final award" plaintiff had not appealed, thereby rendering said final award a thing adjudged.

At the trial of the exceptions, the trial judge pretermitted argument concerning the other exceptions filed by defendant and restricted argument to the peremptory exception urging res judicata. (Record Page 50) The case was taken under advisement by the trial court, and in accordance with written reasons for judgment, judgment was rendered, read and signed sustaining the peremptory exception urging res judicata and dismissing plaintiff's suit.

Plaintiff filed a motion for a new trial, and after a stipulation was entered in the record concerning additional evidence, the trial judge denied the motion for a new trial. (Record Pages 84-86) Plaintiff-appellant devolutively appealed from the adverse judgment, which judgment was affirmed by the First Circuit Court of Appeal.

Plaintiff applied for a rehearing, which was denied, and subsequently a writ of review was issued by this

Court on plaintiff's application. The errors complained of by plaintiff are the following:

ASSIGNMENT OF ERRORS

1. THE COURT OF APPEAL ERRED IN CONCLUDING THAT DEFENDANT COULD PROPERLY AND CONSTITUTIONALLY INVOKE THE JURISDICTION OF THE TEXAS INDUSTRIAL ACCIDENT BOARD, AND THUS ELECT TO DEPRIVE PLAINTIFF OF NINETY-NINE WEEKS OF TOTAL AND PERMANENT DISABILITY COMPENSATION BENEFITS.

2. THE COURT OF APPEAL ERRED IN CONCLUDING THAT THE TEXAS INDUSTRIAL ACCIDENT BOARD PROPERLY EXERCISED JURISDICTION SO AS TO OUST THE LOUISIANA COURT'S JURISDICTION WHICH HAD PREVIOUSLY BEEN INVOKED BY PLAINTIFF.

3. THE COURT OF APPEAL ERRED IN CONCLUDING PLAINTIFF MADE A CONSTRUCTIVE CHOICE OF TEXAS LAW BY ACCEPTING COMPENSATION BENEFITS.

4. THE COURT OF APPEAL ERRED IN CONCLUDING THAT THE TEXAS IN-

DUSTRIAL ACCIDENT BOARD'S SO-CALLED "FINAL AWARD" CONSTITUTED *RES JUDICATA*.

5. THE COURT OF APPEAL ERRED IN CONCLUDING THAT THE FULL FAITH AND CREDIT DOCTRINE OF *MAGNOLIA PETROLEUM COMPANY VS. HUNT* CAN BE APPLIED EVEN WHERE PLAINTIFF FILED NO WORKMEN'S COMPENSATION CLAIM WHATSOEVER IN TEXAS, FILED HIS FIRST AND ONLY CLAIM FOR WORKMEN'S COMPENSATION IN LOUISIANA, AND WAS TOTALLY UNAWARE OF ANY CORRESPONDENCE OR COMMUNICATION FROM DEFENDANT TO THE TEXAS INDUSTRIAL ACCIDENT BOARD AND THE OPENING OF A FILE BY THE TEXAS INDUSTRIAL ACCIDENT BOARD UNTIL AFTER PLAINTIFF EFFECTED A COMPROMISE SETTLEMENT WITH THE INSURER OF THE ALLEGED THIRD PARTY TORTFEASOR.

6. THE COURT OF APPEAL ERRED IN CONCLUDING THAT THE MAGNOLIA DOCTRINE HAS ANY APPLICABILITY TO THE INSTANT CASE, SINCE THE UNITED STATES SUPREME COURT HAS EXPRESSLY RESTRICTED THAT DOCTRINE AND MADE IT FACTUALLY

INAPPOSITE TO THE INSTANT CASE, SUBSTITUTING THEREFOR THE SUPREME COURT'S "McCARTIN" DOCTRINE.

7. THE COURT OF APPEAL ERRED IN CONCLUDING THAT DEFENDANT HAD A RIGHT TO TREAT ITS WORKMEN'S COMPENSATION PAYMENTS TO PLAINTIFF AS PAYMENTS MADE PURSUANT TO THE LAW OF TEXAS WHERE THE CONTRACT DOCUMENTS, WHICH WERE BINDING ON DEFENDANT INSURER, OBLIGATED THE LATTER TO PAY WORKMEN'S COMPENSATION IN ACCORDANCE WITH THE LAW OF THE STATE WHERE THE VAN LINE WAS DOMICILED, OR IN THIS CASE, THE LAW OF THE STATE OF GEORGIA.

ARGUMENT ON ASSIGNMENT OF ERROR NO. 1

The Court of Appeal erred in concluding that defendant could properly and constitutionally invoke the jurisdiction of the Texas Industrial Accident Board, and thus elect to deprive plaintiff of ninety-nine weeks of total and permanent disability compensation benefits.

It is submitted that there exists no dispute concerning the facts of this case, and this litigation presents solely issues of law.

The evidence shows that plaintiff, Newal W. Griffin, sustained serious personal injuries on June 29, 1970 as a result of a motor vehicle accident which occurred on U. S. Highway 61 (Airline Highway) in Ascension Parish, Louisiana. At the time of the accident plaintiff was driving a moving van in the course and scope of his employment with Keller Industries, Inc., a Texas corporation, insured through Motor Truck Owners Conference, Inc., a Kansas City, Missouri, concern, which was the named insured of defendant, Universal Underwriters Insurance Company, under a policy of workmen's compensation insurance. At the time of the accident the moving van being operated by plaintiff was under lease to U. S. Van Lines, Inc., of Atlanta, Georgia. (Exhibit "E", Record, Page 31).

As a result of the serious and near fatal injuries sustained by plaintiff, it was necessary that he be hospitalized at the Baton Rouge General Hospital in Baton Rouge, Louisiana, where he remained for a period of four and one-half months post-accident. (Record, Page 57) Plaintiff's wife came from Houston, Texas, rented an apartment in Baton Rouge, Louisiana, and stayed with plaintiff to help with his needed nursing and convalescing. Following his release from the hospital, plaintiff continued to remain under the medical care and treatment of Dr. Allen Jackson, a Baton Rouge orthopedist (Record, Page 57).

The evidence undisputedly shows that plaintiff did nothing whatsoever, either personally or through any agent, to make a claim for compensation benefits under the law of Texas. On the contrary, defendant im-

mediately began paying the $18,000.00 of medical expenses to the Louisiana medical creditors who were taking care of plaintiff, and likewise immediately began paying plaintiff his $49.00 per week total and permanent compensation benefits through the Baton Rouge office of Crawford & Company, defendant's independent insurance adjuster. The evidence further shows that plaintiff was at no time advised by anyone, nor did he or his undersigned attorney have any reason to believe, that plaintiff's workmen's compensation claim was being treated in any manner other than as a Louisiana workmen's compensation claim. Inasmuch as plaintiff was receiving the compensation benefits to which he was entitled and was having his Louisiana-incurred medical expenses paid by defendant, plaintiff could not file any suit in Louisiana, because such suit would have been premature, Louisiana Revised Statute 23:1314 (which provides that if compensation benefits and proper medical expenses are being furnished a suit "shall be premature and shall be dismissed").

Although defendant's exception urging res judicata alleged that, "plaintiff filed a claim for workmen's compensation with the Texas Industrial Accident Board" (Record, Page 27), the evidence unequivocally shows that plaintiff never filed any such claim in Texas, never authorized anyone to file any such claim on his behalf, never received any communication or correspondence from anyone advising him that any such claim or notice of accident or injury had been brought to the attention of the Texas Industrial Accident Board until after he had effected a compromise settlement

with the insurer of the alleged tortfeasor in the sum of $10,000.00, and filed his first and only claim for workmen's compensation by the instant suit in Louisiana. (See Stipulation, Record, Pages 85 through 86. See also Record, Page 57)

Before any judicial proceedings whatsoever had been filed, plaintiff effectuated a compromise settlement with State Farm Mutual Automobile Insurance Company and its alleged negligent insureds in the sum of $10,000.00 paid by State Farm on April 22, 1971. (Record, Pages 18, 19) Nothing further happened in this matter and plaintiff continued to receive his $49.00 weekly workmen's compensation benefits paid by defendant, which coincidentally is the maximum compensation benefit rate in Texas as well as in Louisiana, until plaintiff received a letter from defendant, Universal Underwriters Insurance Company, of Kansas City, Missouri, on June 29, 1971, wherein plaintiff was advised that he would receive no more workmen's compensation benefits because of his alleged election of remedies against third party which allegedly precluded his right to receive additional compensation under the Texas workmen's compensation law and in addition demanded that plaintiff reimburse defendant the $10,000.00 which plaintiff received from State Farm.

Plaintiff forwarded this letter to his undersigned attorney, who wrote a demand letter to defendant on July 8, 1971, a copy of which letter is attached to plaintiff's original brief in the First Circuit Court of Appeal marked for identification as Appendix 1.

When defendant failed to resume payment of weekly compensation benefits in accordance with the demand made by counsel for plaintiff in the aforementioned July 8, 1971 letter, plaintiff filed the instant suit on July 27, 1971.

On August 18, 1971 the Texas Industrial Accident Board, allegedly upon its own motion, determined that plaintiff had made a final election under the Texas Workmen's Compensation Law to proceed against a third party, with the result that plaintiff was no longer entitled to any additional benefits "under the Texas Workmen's Compensation Act". This letter which was sent to plaintiff with a copy to his undersigned attorney, was the first and only communication which either plaintiff or his attorney received from the Texas Industrial Accident Board. This letter indicated plaintiff had twenty days within which to appeal this so-called "final award". A copy of this letter is attached to plaintiff's original brief filed with the First Circuit Court of Appeal, marked Appendix II. Inasmuch as plaintiff had never sought workmen's compensation under the Texas Workmen's Compensation Law, and had some three weeks prior to this action being taken by the Texas Industrial Accident Board already filed the instant workmen's compensation suit in Louisiana, plaintiff did not attempt to appeal this so-called "final award" of the Texas Industrial Accident Board, which by its terms only precluded plaintiff's right to any additional compensation under the *Texas* Workmen's Compensation Act.

It is submitted that under the foregoing circumstances the Court of Appeal erred in concluding that

the defendant could properly and constitutionally invoke the jurisdiction of the Texas Industrial Accident Board, and thus deprive plaintiff of ninety-nine weeks of total and permanent disability compensation benefits. Under the applicable Louisiana law, plaintiff is entitled to five hundred weeks of compensation at the rate of $49.00 per week, Louisiana Revised Statute 23:1221, as amended, whereas under Texas law plaintiff is entitled only to four hundred one weeks of compensation at the rate of $49.00 per week, Vernon Texas Statutes Annotated Title 130, Article 8306, Section 10 as amended. Obviously, it is plaintiff's claim for compensation, not defendant's, and defendant cannot unilaterally select a forum which operates to mitigate or diminish the compensation to which plaintiff is otherwise entitled. To hold otherwise results in an unconstitutional deprivation of due process and equal protection under the law.

Moreover, for the reasons more particularly set forth in the argument accompanying Specification of Error 7, defendant was contractually precluded from selecting which law to apply, and had available only the right to select the law of the state where the van line was domiciled, i.e., the law of the State of Georgia, which is analogous in effect to that of Louisiana, and which is diametrically opposed to the forfeiture provision contained in the Texas Workmen's Compensation Act.

ARGUMENT ON ASSIGNMENT OF ERROR NO. 2

The Court of Appeal erred in concluding that the Texas Industrial Accident Board properly exercised jurisdiction so as to oust the Louisiana Court's jurisdiction which had previously been invoked by plaintiff.

The Court of Appeal by its opinion herein has condoned the ouster of the Louisiana court's jurisdiction by virtue of the so-called "final award" entered by the Texas Industrial Accident Board, and has thus given no effect to plaintiff's election of remedies and plaintiff's prior institution of his only asserted claim for compensation in Louisiana some three weeks before the Texas Industrial Board entered any order whatsoever. Once plaintiff made his election of remedies and instituted his workmen's compensation suit in Louisiana, the first claim which he ever presented anywhere, such deprived the Texas Industrial Accident Board of the right to exercise jurisdiction in opposition to plaintiff's instituted compensation claim in Louisiana, particularly since such action taken by the Texas Industrial Accident Board was unilateral action instigated by defendant who was sued in Louisiana, and of which plaintiff had no notice, in which plaintiff did not at all participate, acquiesce or ratify.

ARGUMENT ON ASSIGNMENT OF ERROR NO. 3

The Court of Appeal erred in concluding plaintiff made a constructive choice of Texas law by accepting compensation benefits.

The Court of Appeal erred in holding that plaintiff made a constructive choice of Texas law by accepting compensation benefits which were automatically and voluntarily paid to him by defendant's agent in Baton Rouge, Crawford & Company. There was nothing whatsoever in connection with these payments which could in any way possibly apprise plaintiff or his undersigned attorney that defendant was treating this workmen's compensation claim other than as a Louisiana workmen's compensation claim. The compensation checks were for the same amount, contained no descriptive information to place anyone on alert, and were paid to plaintiff in Baton Rouge for the first five months after the accident where plaintiff resided (four and one-half months of which were in Baton Rouge General Hospital). Plaintiff never even saw the $18,000-.00 plus payment of medical expenses, which checks were paid by defendant's Baton Rouge agent directly to the Louisiana medical creditors. It is submitted that it is unfounded and unwarranted to consider plaintiff's acceptance of these weeks of compensation payments under these circumstances "as tantamount to a choice or selection of the state in which he wishes to recover and receive payments on his claim", that is, a choice or selection of the law of Texas, as held by the Court of Appeal (Opinion of First Circuit Court of Appeal, p. 9, 268 So.2d at 709).

All of the evidence negates any knowledge or any constructive notice on the part of either plaintiff or his attorney of any treatment of this matter under the Texas law as opposed to treatment as a Louisiana compensation claim. Indeed, it is interesting to note that

the file copy of the certified letter sent by defendant's Baton Rouge adjuster, W. L. Cawthon of Crawford & Company in Baton Rouge, Louisiana, to the negligent motorist and her husband, dated December 21, 1970, placing these individuals on notice of a subrogation claim by defendant and asking that they turn the letter over to their liability insurer, makes no reference to any Texas compensation proceedings or file per se, which letter, like the compensation checks, emanated from the Baton Rouge agent or adjuster for defendant.

ARGUMENT ON ASSIGNMENT OF ERROR NO. 4

The Court of Appeal erred in concluding that the Texas Industrial Accident Board's so-called "final award" constituted res judicata.

The Court of Appeal further erred in concluding that the Texas Industrial Accident Board's so-called "final award" constituted *res judicata*. At the outset, it will be noted that the so-called "final award" simply purported to preclude plaintiff from the right to claim compensation benefits *under the Texas Workmen's Compensation Act*. It in no way purported to deprive plaintiff of his right to claim compensation under the law of any other state, and thus gave plaintiff no reason for concern inasmuch as he had never made any claim for workmen's compensation under Texas law, had never participated in any proceedings in Texas, and indeed had no prior notice or knowledge of anything going on in Texas until he and his undersigned attorney received a copy of this so-called "final award", which was by its own terms entered some three weeks *after*

plaintiff had already instituted his suit for workmen's compensation benefits in Louisiana.

It is interesting to note that the Court of Appeal quoted Louisiana Civil Code Article 2286 and enumerated the various requisites for *res judicata*. It will be readily observed that Louisiana Civil Code Article 2286 requires that there be *a demand*. The Article says that "the thing demanded must be the same" in the two suits; the article also says that, "the demand must be founded on the same cause of action". The Article further says that the demand must be between the same parties and formed by them against each other in the same quality. *Res judicata* in Louisiana is stricti juris, and the common law more pervasive doctrines such as collateral estoppel do not apply. It is obvious that there was no *demand* whatsoever; plaintiff never demanded anything in Texas. On the contrary, the only thing which occurred in Texas was the unilateral attempt by defendant to have the Texas Industrial Accident Board enter a so-called "final award" declaring plaintiff not entitled to any compensation under the Texas Workmen's Compensation Act. Inasmuch as there was no demand whatsoever, *res judicata* by its terms cannot apply. Nor can the use of the word "demand" be equated with the phrase "cause of action". The requisite, "demand" imparts something more than a cause of action; namely, an instituted claim or an instituted action. That the term "demand" can not be equated with the phrase "cause of action" is particularly salient by reading the following clause of Article 2286: "The demand must be founded on the same cause of action." Obviously, "demand" means

something more than "cause of action". There having been no demand by plaintiff in Texas, that is, no claim filed in Texas, no proceedings brought in Texas, no acquiescence in any Texas proceedings, and indeed no action whatsoever taken in any respect by plaintiff in Texas, it is simply unfounded to conclude that *res judicata* as defined by Louisiana Civil Code Article 2286 can have any possible applicability to this situation.

It is also submitted that the so-called "final award" by the Texas Industrial Accident Board does not at all purport to constitute an adjudication on the merits of plaintiff's claim for workmen's compensation benefits, but on the contrary is strikingly similar to a statutory scheme which prevails in Texas, and which is entitled to no greater full faith and credit than this Court permitted and clothed the Mississippi statutory scheme in *McNeal vs. State Farm Mutual Automobile Insurance Company*, ____ La. ____, 278 So.2d 108 (1973). As this Court will recall in *McNeal*, this Court refused to apply res judicata to the Mississippi litigation or to give the Mississippi adjudication full faith and credit under the full faith and credit clause of the United States Constitution, for the following reasons:

> "The doctrine of res judicata is stricti juris, and any doubt as to its application must be resolved in favor of maintaining the action. Quinette vs Delhommer, 247 La. 1121, 176 So.2d 399 (1965); West v. His Creditors, 3 La. Ann. 529 (1848).

"Under the full Faith and Credit Clause of the United States Constitution, a judgment that is not on the merits is no bar to later proceedings on the same cause of action. U.S. Const. Art. IV § 1; Angel v. Bullington, 330 U.S. 183, 67 S.Ct. 657, 91 L.Ed. 832 (1946); Laroussini v. Werlein, 50 La.Ann. 637, 23 So. 467 (1898); Lerner v. Bischoff, La.App., 193 So. 236 (1940); 47 Am.Jur.2d, Judgments, § 1235, p. 237; Leflar, The Law of Conflict of Laws § 78, p. 138 (1959); 15 Tul.L.Rev. 312-314 (1941).

"Although the Mississippi judgment dismissed the suit against State Farm Mutual, the insurer, it did so on the technical ground that the absence of a direct action statute and the family immunity doctrine barred the suit in Mississippi. The judgment did not reach the merits of the case. Hence, as to the present suit in Louisiana, it is not res judicata."

McNeal vs. State Farm Mutual Automobile Insurance Company, 278 So.2d at 110 — emphasis supplied by author of this brief.

ARGUMENT ON ASSIGNMENT OF ERROR NO. 5

The Court of Appeal erred in concluding that the full faith and credit doctrine of Magnolia Petroleum Company vs. Hunt can be applied even where plaintiff filed no workmen's compensation claim whatsoever in Texas, filed his first and only claim for workmen's compensa-

tion in Louisiana, and was totally unaware of any correspondence or communication from defendant to the Texas Industrial Accident Board until after plaintiff effected a compromise settlement with the insurer of the alleged third party tortfeasor.

The Court of Appeal erred in concluding that the full faith and credit doctrine of *Magnolia Petroleum Company vs. Hunt* can be applied even though plaintiff has made no claim and no choice of law, filed no compensation claim whatsoever in Texas, filed his first and only compensation claim in Louisiana, and was totally unaware of any correspondence or communication from defendant to the Texas Industrial Accident Board and the opening of a file by the Texas Industrial Accident Board until after plaintiff effected the compromise settlement with the insurer of the alleged third party tortfeasor. The Court of Appeal quoted extensively from *Magnolia Petroleum Company vs. Hunt*, 320 U.S. 430, 64 So. Ct. 208 (1943), but then chose to disregard the clear language of that decision basing its result on the fact that the employee Hunt, having chosen to seek and pursue his compensation remedy in Texas, was thereafter precluded from seeking a compensation remedy in Louisiana upon the same grounds. This is made clearly evident by the following sentence quoted from *Magnolia Petroleum Company vs. Hunt* and reproduced on Page 7 of the court of appeal's opinion:

"... Respondent was free to pursue his remedy in either state but, having chosen to seek it

> in Texas, where the award was res judicata, the full faith and credit clause precludes him from again seeking a remedy in Louisiana upon the same grounds."

The Court of Appeal, it is submitted, chose to disregard the clear rationale of *Magnolia Petroleum Company vs. Hunt,* and chose instead to opine that the decision of the Texas Industrial Accident Board in *Magnolia Petroleum Company vs. Hunt* became res judicata, "not because plaintiff employee had a choice of forums, but because he had failed to appear at a hearing on the Board's final award, when duly notified of it". (Opinion of First Circuit Court of Appeal, Page 9) It is submitted that a fair reading of *Magnolia Petroleum Company vs. Hunt* clearly shows that this suggested basis was not that on which the United States Supreme Court decided the case, but, on the contrary, the basis for the Supreme Court's decision was that the employee Hunt, having chosen to pursue his compensation remedy first in Texas, and thus having invoked on his own the Texas jurisdiction, he could not thereafter revoke his election of remedies and subsequently pursue a compensation remedy in Louisiana.

Moreover, at least the employee Hunt was given prior notice of the scheduled date for the hearing to be conducted by the Texas Industrial Accident Board. In the instant case, plaintiff had no prior notice of any hearing whatsoever, and was instead met with a *fait accompli* when he received his first communication from the Texas Industrial Accident Board, to wit, a

purported decision or "final award" which had been accomplished without any notice either to plaintiff, or to his undersigned counsel, or to anyone else.

Such procedure has recently been expressly repudiated by the United States Supreme Court as violative of constitutional due process. In this connection this Court's attention is invited to the following pertinent excerpt from the United States Supreme Court's Opinion in *Fuentes vs. Shevin*, 92 So. Ct. 1983 (1972):

> "[1,2] For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must be notified.' Baldwin v. Hale, 68 U.S. 223, 1 Wall. 223, 17 L.Ed. 531. See Windsor v. McVeigh, 93 U.S. 274, 23 L.Ed. 914; Hovey v. Elliott, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215; Grannis v. Ordean, 234 U.S. 385, 34 S.Ct. 779, 58 L.Ed. 1363. It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.' Armstrong v. Manzo, 380 U.S. 545, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62.
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> * * *
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> "[3,4] The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions.

The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment — to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party. So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference. See Lynch v. Household Finance Corp., 405 U.S. ____, ____, 92 S.Ct. 1113, 1122, 31 L.Ed.2d 424.

"The requirement of notice and an opportunity to be heard raises no impenetrable barrier to the taking of a person's possessions. But the fair process of decisionmaking that it guarantees works, by itself, to protect against arbitrary deprivation of property. For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented. It has long been recognized that 'fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights .... [And n]o better instrument has been devised for arriving at truth

than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.' Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 170-172, 71 S.Ct. 624, 647, 95 L.Ed. 871 Frankfurther, J., concurring).

"[5] If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if it was unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. 'This Court has not ... embraced the general proposition that a wrong may be done if it can be undone.' Stanley v. Illinois, 405 U.S. ____, ____, 92 S.Ct. 1208, 1210, 31 L.Ed.2d 551."

Fuentes vs. Shevin, 92 S.Ct. at 1994, 1995.

It is submitted that plaintiff cannot constitutionally be required to abandon his previously-instituted Louisiana compensation claim and appeal from the Texas Industrial Accident Board's so-called "final award" in order to preserve his right to compensation benefits, particularly where plaintiff in no way whatsoever participated in or had knowledge of any proceedings in

Texas. Indeed, there were no proceedings in Texas, no prior scheduled hearing, but on the contrary, simply the *ex proprio motu* determination by the Texas Industrial Accident Board, without prior notice to anybody, including plaintiff, that plaintiff was no longer entitled to compensation benefits under the Texas Workmen's Compensation Act. Plaintiff had no opportunity to be heard before the purported forfeiture of this right to compensation took place. This unconstitutional deprivation of due process and equal protection under the law deprives the so-called Texas decree of the dignity needed to have it constitute *res judicata* and be entitled to full faith and credit.

Moreover, it is earnestly submitted that Texas obviously would not do the same thing that Louisiana has done to plaintiff herein, as evidenced by the case of *Standard Accident Insurance Company vs. Skidmore,* 222 S.W.2d 344 (1949). In the *Skidmore* case, the defendant insurance company tried to make the Texas Court give full faith and credit to an Arkansas Workmen's Compensation Commission award to the plaintiff of twelve weeks of compensation for temporary total disability, which was all of the compensation which the Arkansas Commission determined plaintiff employee was entitled to, even though plaintiff had accepted the compensation payments. When the matter was litigated in Texas, however, plaintiff claimed that he had not filed any claim in Arkansas and had not made any election of remedies. Moreover, there was no showing that the plaintiff knew of the filing of the claim on his behalf by his employer or the action by the Arkansas Commission until after all of the pay-

ments had been made to him, *after which,* he filed claim in Texas. The Texas appellate court concluded that the evidence failed to establish a binding election of remedies on the part of the plaintiff-employee, so as to warrant the sustaining of a plea in abatement and motion to dismiss filed by the defendant insurer. Stated simply, the Texas Court refused to give full faith and credit to the Arkansas Commission award and refused to hold that award as *res judicata* because of the absence of proof of an election of remedies by the plaintiff-employee. A copy of this case is attached to the application for rehearing and incorporated herein, marked Exhibit "I".

It is obvious that the Texas citizen in the *Skidmore* case was not deprived of his right to compensation by virtue of the Arkansas Commission award, whereas the Texas citizen in the instant case is being deprived of his right to compensation in Louisiana. Both cases are analogous in that the evidence clearly shows that in both cases neither employee knew of the proceedings which occurred in another state, nor had the employee made any binding election so as to dignify the proceedings in the other state to the point where they were entitled to full faith and credit. Since there was no election of remedies there was no applicability of the full faith and credit clause. By the Court of Appeal's holding herein, the Court has unconstitutionally deprived this plaintiff of equal protection under the law. It is submitted that just as the employee *Skidmore* was permitted to ignore the Arkansas Commission proceedings because he had not elected to pursue any remedy in Arkansas, even though he collected compensa-

tion pursuant to the Arkansas decree, plaintiff herein was not required to appeal the so-called "final award" by the Texas Industrial Accident Board in order to preserve his previously made election of remedies by instituting suit in Louisiana before anything happened in Texas, and where plaintiff had instituted no proceedings in Texas or done anything whatsoever to possibly warrant the conclusion that he elected to proceed under Texas law.

The trial judge in his written reasons for judgment expressed sympathy for plaintiff's position in this litigation, but nevertheless felt constrained to apply the decision of *Magnolia Petroleum Company vs. Hunt*, 320 U.S. 430, 64 Sup.Ct. 208 (1943) and thus sustain the peremptory exception urging res judicata:

> "This court is in accord with the views expressed in the dissenting opinion of Justice Black in Magnolia. Were it my prerogative to do so I would overrule Magnolia or at least restrict its application to those instances where an employee knowing of two remedies which purport to be mutually exclusive, knowledgably [sic] chooses one as against the other and is thereafter precluded from a second choice. But recognizing the supremacy of the Supreme Court of the United States as the 'final arbiter' in these conflict of laws problems I have no choice but to apply the rule of Magnolia, sustain the defendant's plea of res judicata, and dismiss the plaintiff's suit at his

costs." (Written Reasons for Judgment, Record, p. 40)

It is submitted that a cursory reading of the United States Supreme Court's opinion in *Magnolia Petroleum Company vs. Hunt*, cited supra, readily shows that this is exactly the reason that the plaintiff-employee, Hunt, was barred from a double recovery in Louisiana; to wit: He had *knowingly* chosen to pursue his compensation remedy in Texas, and it was not until *after* a final award of compensation had been made in Texas that the plaintiff-employee first attempted to seek recovery in Louisiana.

It is respectfully submitted that the trial court erred in considering as the controlling findings of fact in *Magnolia Petroleum Company vs. Hunt*, cited supra, the interpretation of those facts set forth in the dissenting opinion. This is made evident by a review of the trial court's reasons for judgment as follows:

> "... But neither was Hunt, the employee in Magnolia, aware of the fact that the two forms presented to him for his signature were documents prepared by the Industrial Accident Board. In neither case did the employee participate in the proceedings before the Board and in both instances the employee filed suit in Louisiana before the Texas award became final."
> (Written Reasons for Judgment, Record, pp. 36, 37)

It is significant to note that this version of the facts is not that which was found by the Louisiana First Circuit Court of Appeal, as evidenced by its reported decision in *Hunt vs. Magnolia Petroleum Company,* 10 So.2d 109 (La.App. 1st Cir. 1942). In particular, this Court's attention is directed to the following excerpts from the Louisiana appellate court's opinion and relevant findings of fact:

> "On June 8, 1939, plaintiff also submitted two forms to the Industrial Accident Board, both of which had been supplied by the Board, one being styled 'Claim for Compensation' and the other 'Notice of Injury'. These forms were filled out by plaintiff's wife but were signed by him. All matters relating to the filing of these forms by both the employer and the employee appeared to have been in conformity with the usual procedure under the Workmen's Compensation Law of Texas." (10 So.2d at 110)

> "Several months later he was sent to San Antonio, Texas to be examined by Dr. Amos Graves, and on October 16, 1940, *he wrote a letter which he addressed to the 'State Board of Compensation, Austin, Texas'* in which he stated that Dr. Graves had advised him to undergo further operations on his leg and he would like to know what effect his refusal to submit to such operations would have on his compensation payments. *He also made some inquiries regarding a reasonable settlement*

for his injury." (10 So.2d at 110 — emphasis added.)

The Louisiana appellate court unequivocally concluded that the plaintiff-employee *voluntarily participated* in the proceedings before the Texas Industrial Accident Board and thereby became a party to the same, as evidenced by the following:

"... nor can we agree that plaintiff did not at least voluntarily participate in the proceedings before that Board and thereby became a party to the same." (10 So.2d at 112, 113)

These same crucial findings of fact and the whole tenor of the majority of the United States Supreme Court opinion is to the same effect, as evidenced by the following excerpts from the Supreme Court opinion in *Magnolia Petroleum Company vs. Hunt,* cited supra, to wit:

"*He sought and procured in Texas an award of compensation for his injury under its Workmen's Compensation Law,* and petitioner's insurer made payments of compensation as required by the statute and the award." (64 Sup. Ct. at 210 — emphasis added.)

"*Respondent filed with the Texas Industrial Accident Board a claim for compensation for his injury under the Texas Workmen's Compensation Law,* as is the usual method of instituting a proceeding before the Board. Without

awaiting an award on respondent's claim, petitioner's insurer paid respondent compensation for his injury at the statutory maximum for seventy-three weeks. A dispute as to the proper prognosis of respondent's injury, *a request for advice made by respondent to the Board,* and a suspension by the insurer of further compensation payments to respondent, on the ground that his total disability had terminated, *all prompted the Board to set the case for a hearing on his pending claim.*" (Footnote 2, 64 Sup.Ct. at 210, 211 — emphasis added.)

"But it does not follow that the employee who has sought and recovered an award of compensation in either state may *then* have a recourse to the laws and courts of the other to recover a second or additional award for the same injury." (64 Sup.Ct. at 212, 213 — emphasis added.)

Respondent was free to pursue his remedy in either state *but, having chosen to seek it in Texas,* where the award was res judicata, the full faith and credit clause precludes him from again seeking a remedy in Louisiana upon the same grounds." (64 Sup.Ct. at 216 — emphasis added.)

Another Texas case which emphasized and demonstrated the determining criterion to be the election of remedies by the plaintiff-employee is *Texas Employers' Insurance Association vs. Hale,* 242 S.W.2d 796

(1951), the pertinent part of which is attached to plaintiff's original brief filed in the First Circuit Court of Appeal and marked Appendix VI. This Court's attention is directed to Headnote No. 1 and the accompanying test therefor appearing at Page 797, both of which indicate that inasmuch as the evidence failed to show that the plaintiff-employee elected to receive compensation under the laws of New Mexico, he was not precluded from proceeding under the laws of Texas.

This same point was made by the United States Supreme Court in *Carroll vs. Lanza*, 349 U.S. 408, 75 Sup. Ct. 804, 806, wherein it distinguished the earlier Supreme Court opinion of *Magnolia Petroleum Company vs. Hunt*, as follows:

> "Nor do we have a case where an employee, knowing of two remedies which purport to be mutually exclusive, chooses one as against the other and therefore is precluded a second choice by the law of the forum."

It is well established that the doctrine of res judicata is stricti juris, and in cases of doubt must be rejected, *McNeal vs. State Farm Mutual Automobile Insurance Company*, ____ La. ____, 278 So.2d 108 (1973); *Eugene vs. Ventress*, 253 La. 840, 220 So.2d 94 (La. Sup. Ct. 1969). Inasmuch as res judicata is raised by a peremptory exception, the burden of proof is upon the exceptor which must establish each essential element of the doctrine beyond all question before the exception urging res judicata can properly be sustained, *Road Equipment Company vs. Prestenback*, 143 So.2d

135 (La. App. 1st Cir. 1962); *Terrebonne vs. Abadie*, 132 So.2d 106 (La. App. 1st Cir. 1962). Stated otherwise, an exception urging res judicata, because res judicata is strictly construed, should not be sustained "unless pleadings *and facts* clearly justify its application", *Pacific Finance Company of Caddo vs. Benson*, 149 So.2d 239 (La. App. 2d Cir. 1963), writ refused, 244 La. 128, 150 So.2d 588.

It is submitted that the defendant-exceptor failed to carry the heavy burden of proof necessary to warrant application of the plea of res judicata. All of the pertinent jurisprudence, including most importantly the case relied on so heavily by the defendant-exceptor, *Magnolia Petroleum Company vs. Hunt*, cited supra, emphasizes that only where the plaintiff-employee has elected to pursue a compensation remedy in one state will the court of another state be justified in holding the plaintiff bound by such election. There is absolutely no evidence in the case presently before the Court to indicate in any way, shape or form such an election of remedies by the plaintiff. There is no evidence whatsoever to indicate the plaintiff even knew that anything was being done in Texas or under Texas law until after his compensation payments were terminated by the defendant, whereupon plaintiff instituted this suit in Louisiana *before* any Texas decree was entered.

Plaintiff did not choose to pursue a compensation remedy in Texas nor did plaintiff participate in any compensation proceedings in Texas such as plaintiff Hunt did in *Magnolia Petroleum Company vs. Hunt*.

Because of this absence of choice, this absence of any election by the plaintiff of remedies, and indeed the complete absence of knowledge by either plaintiff or his undersigned counsel of any Texas proceedings, it is submitted that the exception urging res judicata should have been overruled.

Since plaintiff had no knowledge of any Texas proceedings, how possibly could the plaintiff protect himself from the result which the trial court reached? The election of remedies and the choice of compensation laws under which plaintiff's claim is to be disposed of rests with the plaintiff, and plaintiff chose Louisiana. It is strenously urged that there is nothing in the law, the facts or in equity which warrants or requires Louisiana courts to deny plaintiff his choice.

It is clear that where the injury occurs in Louisiana, this alone is sufficient to make applicable the Louisiana Workmen's Compensation Act, even though both the employee and the employer be residents of another state, and even if the contract of employment was entered into in another state, *Johnson vs. El Dorado Creosoting Company,* 71 So.2d 613 (La.App.2d Cir. 1954 - See Headnote 10 and accompanying opinion at pp. 618 and 619). See also *Mattel vs. Pittman Construction Company,* 174 So.2d 341 (La.App.4th Cir. 1965).

Even the Texas Workmen's Compensation Statute does not seek to preclude a Texas employee from electing to pursue a workmen's compensation remedy in another state wherein the employee sustained the injury, as evidence by Article 8306, Section 19(c), a copy

of which Texas statutory provision was attached to plaintiff's original brief filed with the First Circuit Court of Appeal.

Plaintiff validly elected to pursue his claim for workmen's compensation in Louisiana, rather than in Texas by the filing of the instant suit, which was certainly to plaintiff's benefit, inasmuch as the compensation period for total and permanent disability is 500 weeks in Louisiana, whereas it is only 401 weeks in Texas (Compare Louisiana Revised Statute 23:1221 as amended with Vernon Texas Statutes Annotated Title 130, Article 8306, Section 10 as amended).

Significantly, defendant-appellee itself chose to avail itself of the Louisiana Workmen's Compensation Act by virtue of its having filed in the same trial court a suit wherein Universal Underwriters Insurance Company has sought to recover the amount of compensation benefits and medical expenses paid to or on behalf of Newal W. Griffin, in accordance with the subrogation rights accorded by Louisiana Revised Statute 23:1101 of the Louisiana Workmen's Compensation Act. (See *"Universal Underwriters Insurance Company vs. Leslie S. Richard, Connie C. Richard and State Farm Mutual Automobile Insurance Company*), No. 17,511 — 23rd Judicial District Court Ascension Parish, filed June 24, 1971, which suit record has been introduced in evidence herein, Record, P. 86). Indeed, in this suit, by amended petition, defendant-appellee has made plaintiff, Newal W. Griffin, an additional defendant, against whom it seeks reimbursement of the $10,000.00 previously received by Newal W. Griffin from State

Farm, while at the same time maintaining that it owes Mr. Griffin no further workmen's compensation.

If the judgments of the trial court and the Court of Appeal are permitted to stand, then plaintiff will be deprived of 449 weeks of compensation benefits for his admitted total and permanent disability, even though plaintiff elected to pursue his workmen's compensation claim solely in Louisiana, and was totally unaware of any unilateral effort by defendant to classify his right to compensation as a "Texas compensation claim".

Both *Magnolia Petroleum Company vs. Hunt* and the jurisprudence construing it have applied the "Hunt" rule only where the plaintiff-employee, not the defendant-employer or the workmen's compensation insurer, has made a binding election of remedies. Plaintiff herein neither elected to pursue any compensation remedy in Texas, nor did he acquiesce in any Texas compensation proceedings, and on the contrary, elected to pursue a compensation remedy only in Louisiana.

Defendant has in essence asserted that even though plaintiff elected to pursue his compensation remedy in Louisiana and filed suit thereon after amicable demand to no avail *before* either plaintiff or his attorney received any notice whatsoever from the Texas Industrial Accident Board concerning the so-called final award, and in fact *before* this order was ever rendered, for some reason plaintiff was required to place his Louisiana suit for compensation benefits in abeyance,

or possibly even abandon it, and hire another attorney to appear before the Texas Industrial Accident Board or a court of review in Texas or else suffer the consequences of res judicata. This simply cannot be the law. All of the cases clearly show that plaintiff employee has the right to elect the forum, which plaintiff did in this case. Plaintiff filed his suit for compensation benefits in Louisiana *before* the Texas Industrial Accident Board took any action whatsoever.

The inequity of defendant's argument becomes more apparent when we consider the proposition that if defendant is correct in its reasoning, then defendant could have elected to institute commission or judicial proceedings in Kansas City, Missouri, the domicile of its named insured and the statutory employer of plaintiff, or in Georgia, where U. S. Van Lines, Inc. of Atlanta, Georgia, for whom plaintiff was driving the truck under lease, was domiciled, thus requiring plaintiff to abandon his chosen compensation claim in Louisiana and seek to protect his interest in Missouri or Georgia.

In this particular case plaintiff exercised his constitutional and valid choice of forum by instituting his claim for compensation benefits in Louisiana before anything was done in Texas. The essential error committed by the trial court and by the Court of Appeal in the instant case was the conclusion that plaintiff could be held to have forfeited his rights to workmen's compensation benefits by effecting a compromise settlement with State Farm Mutual Automobile Insurance Company for substantially less than what the unpaid

total and permanent compensation benefits would be, which was done at a time when plaintiff was completely unaware that the defendant insurance company herein was unilaterally treating this claim as a Texas compensation claim, without any notice to plaintiff or his attorney.

It is the clearly established law of Louisiana that workmen's compensation statutes, being intended to remove the burden of waste of life and limb from working men to their employers, who will distribute it among consumers of their products, should be liberally interpreted by courts in order to give such statutes the full benevolent effect intended by the lawmakers. As stated by the Louisiana Supreme Court in *Johnson vs. Cabot Carbon Company*, 227 La. 941, 81 So.2d 2, 4 (1955):

> "In the case of Dyer v. Rapides Lumber Company [In re Dyer], 154 La. 1091, 98 So. 677, 679, we held as follows:
>
> '* * * workmen's compensation statutes are intended to take the burden of the waste of life and limb *off the shoulders of working men and place it upon those of their employers, who in turn would distribute it amongst the consumers of the product. And in order to give such statutes the full benevolent effect intended by the lawmaker, it is essential that courts should give them a liberal interpretation.* And such has been the attitute of this court from the beginning toward our own statute, as we have

> just had occasion to say in Lemieux v. Cousins, [154 La. 81] 98 So. 255, this day decided.'" [Emphasis supplied by the Louisiana Supreme Court]

Exactly the reverse effect is obtained in the instant case if the judgments of the trial court and the Court of Appeal are allowed to stand, as the result of such a judgment would be the unconscionable forfeiture of plaintiff's rights to total and permanent compensation disability benefits for 449 weeks, which unpaid sum, even when discounted, obviously greatly exceeds the $10,000.00 paid to plaintiff by State Farm Mutual Automobile Insurance Company. This injustice and inequity should not be permitted to occur, especially since if defendant-appellee is entitled to a credit for the $10,000.00 which plaintiff received, such credit could be given against the outstanding, unpaid 449 weeks of compensation benefits.

A recent example of the applicability of the principles of nonforfeiture of rights by an employee and the liberal construction of the Workmen's Compensation Act in favor of the employee is found in *Brooks vs. Griggs Casing Crews, Inc.*, 136 So.2d 693 (La. App. 2d Cir. 1961). In this case the plaintiff and a compensation insurance company entered into a court-approved compensation settlement agreement where plaintiff was employed in Louisiana but sustained accidental injury in Texas. Plaintiff was under the misconception that the Louisiana rule precluding a tort action against a statutory employer or principal contractor likewise applied in Texas. After the compensation settlement

had been court approved, plaintiff learned of his mistake, and sought to have the court-approved compensation settlement rescinded, so that he could proceed in Texas for compensation benefits, and also have a tort action against the principal contractor or statutory employer. Predictably, the principal contractor opposed this effort and appealed an adverse judgment. The appellate court dismissed the appeal, concluding that even if the mistake with regard to Texas law were purely a mistake of law, nevertheless it sufficed to support an annulment of the court-approved settlement.

Defendant has argued that plaintiff is presumed to know the law and the results which would follow from his having made a settlement with the insurance company for the tortfeasor. Counsel for plaintiff disagrees with this argument for the reason that if any mistake were made, it was solely ignorance of the fact that defendant-appellee was treating this compensation claim as a Texas compensation claim, rather than as a Louisiana Compensation claim even though the compensation rates were the same and were paid by checks issued by defendant's Louisiana adjuster, Crawford & Company, in Baton Rouge, Louisiana. Even if there were a so-called mistake of law as opposed to mistake of fact, which is denied, *Brooks vs. Griggs Casing Crews, Inc.* cited supra, indicates that the plaintiff employee can avoid the injurious consequences of such a mistake of law, because of the public policy favoring liberality of construction of the Workmen's Compensation Law in favor of the worker and the public policy opposing forfeitures of compensation benefits.

The essential reason for the judgments of the trial court and Court of Appeal sustaining the peremptory exception urging res judicata was the conclusion that the U. S. Supreme Court decision of *Magnolia Petroleum Company vs. Hunt* so required. In reaching this conclusion, it is submitted that the trial court and the Court of Appeal failed to recognize that the *Hunt* case was, by the very terms of the United States Supreme Court majority opinion, applicable only because the employee Hunt had *first chosen* to pursue his workmen's compensation remedy in Texas and obtained an award of a lump sum for 75 weeks of total disability plus 125 weeks of partial disability. It was Hunt's election of remedies which precluded his then pursuing a compensation remedy in Louisiana.

The instant case is obviously distinguishable from the *Hunt* case, as the evidence conclusively shows plaintiff made no such election of remedies, has never chosen to pursue any compensation remedy in Texas and was at all pertinent times completely unaware of anything which was going on in Texas.

The Louisiana courts were obviously not willing to foreclose Hunt's Louisiana compensation remedy as evidenced by the First Circuit's opinion and the refusal of a writ of error by the Louisiana Supreme Court in that case. It is submitted that the Louisiana courts should not now extend the United States Supreme Court's *Hunt* rule beyond its controlling facts so as to preclude plaintiff's right to compensation in the instant case. Texas would not do so as evidenced by *Standard Accident Insurance Company v. Skid-*

more and *Texas Employers' Insurance Association vs. Hale*, cited supra. This should be especially true where the Louisiana courts are asked to enforce a Texas deprivation of compensation rule which contradicts with Louisiana statutory law, since it is clear that in Louisiana an injured workman does not lose his right to compensation by settling with an alleged third party tortfeasor, Louisiana Revised Statute 23:1101. Defendant is protected in such circumstances since defendant, as a workmen's compensation insurer, has a separate and independent cause of action against the alleged third party tortfeasors and no action which plaintiff might take binds the defendant insurer so as to preclude its independent cause of action against such third parties, Louisiana Revised Statute 23:1103 (last paragraph):

> "No compromise with such third person by either the employer or the injured employee or his dependent shall be binding upon or affect the rights of the others unless assented to by him."

In summation, it is submitted that the election of jurisdictions rests with the plaintiff worker, and not with the defendant compensation insurer. Moreover, the defendant should not be permitted to obtain a complete windfall by penalizing plaintiff for having settled with the tort liability insurer for the policy limits, in complete ignorance of any intention on the part of defendant-appellee to treat this claim as a Texas compensation claim with the obvious effects thereof, especially when absolutely no injury will befall defendant-

appellee by permitting him to recover his workmen's compensation benefits for total and permanent disability, and giving a credit for the sum plaintiff has received against the outstanding 449 weeks of compensation benefits due plaintiff by defendant, if such credit is in fact due. Clearly nothing in the law requires the result reached by the courts below which result thwarts the policy of liberality of construction of compensation laws in favor of the plaintiff and permits a forfeiture of compensation benefits which plaintiff is otherwise clearly entitled to recover.

ARGUMENT ON ASSIGNMENT OF ERROR NO. 6

> *The Court of Appeal erred in concluding that the Magnolia doctrine has any applicability to the instant case, since the United States Supreme Court has expressly restricted that doctrine and made it factually inapposite to the instant case, substituting therefor the Supreme Court's "McCartin" doctrine.*

As previously indicated the trial judge expressed his personal accord with the views of the dissenting opinion of Justice Black in *Magnolia Petroleum Company vs. Hunt,* indicating were it his prerogative to do so, he would limit *Magnolia Petroleum Company vs. Hunt* to its particular facts:

> "This court is in accord with the views expressed in the dissenting opinion of Justice Black in Magnolia. Were it my prerogative to do so I would overrule Magnolia or at least re-

> strict its application to those instances where an employee knowing of two remedies which purport to be mutually exclusive, knowledgably [sic] chooses one as against the other and is thereafter precluded from a second choice. But recognizing the supremacy of the Supreme Court of the United States as the 'final arbiter' in these conflict of laws problems I have no choice but to apply the rule of Magnolia, sustain the defendant's plea of res judicata, and dismiss the plaintiff's suit at his costs." (Written Reasons for Judgment, Record, p. 40)

Undersigned counsel readily admits his dereliction in failing to present either to the trial court or to the Court of Appeal the fact that the United States Court did indeed practically overrule *Magnolia Petroleum Company vs. Hunt* four years later in *Industrial Commission vs. McCartin*, 330 U.S. 622, 67 S.Ct. 886 (1947). The effect of the *McCartin* decision on the *Magnolia* decision has been well analyzed in *Larson's Workmen's Compensation Law*, Vol. 3, pp. 369 through 380, and because of the clarity of this exposition, and in order to avoid unnecessary paraphrasing therefrom, undersigned counsel for plaintiff reproduces and incorporates herein the applicable twelve pages from this treatise, marked for identification as Appendix "A", pp. 52a through 67a.

Larson indicates in early discussion of this question the following: "It is now generally accepted that the *McCartin* case, in practical effect, has recognized the

principle of successive awards and thereby discredited the *Magnolia* case, which had held on its facts that a prior Texas award was a constitutional bar to an award in Louisiana of the amount by which the Louisiana benefits exceeded those allowed by Texas." (Larson, Appendix "A", page 52a) *Larson* points out further in the discussion that the effect of the United States Supreme Court's pronouncements in *McCartin* is that full faith and credit can properly be given to the compensation award of the first state *only if* the workmen's compensation statute of that first state makes it abundantly clear that it is *completely exclusive* and that it is designed to preclude *any recovery* by proceedings brought in *any other* state for injuries received there in the course of employment. In this connection this Court is respectfully requested to review the discussion of the *McCartin* case and the applicable quoted excerpt from that opinion reproduced on Pages 372 and 373 of Volume 3 of *Larson*. (Appendix "A", pp. 57a and 58a).

Larson goes on to recognize that under the Supreme Court's later *McCartin* test even the Texas workmen's compensation statute does not by "unmistakable language" intend to be completely exclusive, and thus bar recovery of compensation benefits in another state by subsequent proceedings in that other state. Indeed, all the applicable Texas statute stands for is the fact that if the converse situation occurs; namely, if the first compensation proceedings are instituted in a state other than Texas, and compensation benefits are awarded, then if a subsequent proceeding is instituted in Texas the Texas law will not permit the claimant

to obtain more in Texas than he was entitled to obtain by virtue of the first compensation proceedings. This distinction concerning the Texas law and its effect is made clear by *Larson* on Pages 373 and 375. (Appendix "A", Pages 58a through 61a)

This distinction is exceedingly pertinent in the instant case, inasmuch as the so-called 'final award' emanating from the Texas Industrial Accident Board clearly intended and expressed the intention that it purported to preclude plaintiff's recovery of additional compensation benefits *only* under the Texas Workmen's Compensation Law. The so-called final award in no way indicated it was intended to be completely exclusive; on the contrary, it indicates solely its restriction insofar as the Texas Workmen's Compensation Law is concerned.

Larson concludes that the practical effect of the United States Supreme Court's *McCartin* decision completely eliminates the practical effect and applicability of the *Magnolia* decision. *Larson* discusses on Pages 375 through 378 of the Treatise various cases which have followed *McCartin* instead of *Magnolia*, since the workmen's compensation law of the state where the first proceeding was conducted did not explicitly preclude proceedings in a subsequent state; see, for example, discussion of *Cook vs. Minneapolis Bridge Construction Company*, 231 Minn. 433, 43 N.W.2d 792 (1950). (Appendix "A", Pages 61a through 64a)

Larson also points out that neither the prior voluntary payment of workmen's compensation benefits,

nor the ex parte payment of compensation benefits as a result of a compensation proceeding instituted ex parte by the employer in which the employee did not participate or apply for — namely, the Texas case of *Standard Accident Insurance Company vs. Skidmore*, 222 S. W. 2d 344 (Texas Civil Appeal 1949) —, nor the denial of compensation in the first state, in any case preclude recovery of compensation in a subsequent case. All three of these principles and situations are applicable in the instant case. The compensation benefits were paid to Mr. Griffin on a voluntary basis by defendant. Secondly, whatever compensation proceedings occurred herein in Texas, they were the result of unilateral ex parte action by defendant in which plaintiff-employee did not apply for compensation or participate in the proceedings. Finally, the effect of the so-called "final award" by the Texas Industrial Accident Board was a denial of compensation in the first state, namely, Texas, (solely, however, under the Texas Workmen's Compensation Law). As stated by *Larson*, this denial does not preclude recovery in the second state, or in this case, in Louisiana. (Appendix "A", Pages 64a through 67a)

It is earnestly submitted that reliance on *Magnolia Petroleum Company vs. Hunt* by trial court and by the First Circuit Court of Appeal is erroneous, not only for the other reasons set forth in this brief, but also for the reason that the *Magnolia* case itself has been effectively repudiated, emasculated and rendered nugatory from a practical standpoint by the United States Supreme Court itself in the *McCartin* case decided by that Court only four years after *Magnolia*. The effect

of the *McCartin* case and its progeny is that no full faith and credit can properly be given to the first compensation award unless the law of the first state is by "unmistakable language" *completely* exclusive in *its intended scope and operation.* The Texas Workmen's Compensation Act, as analyzed by *Larson,* fails to possess any such exclusivity. Moreover, as indicated by *Larson* on Pages 378 through 380 (Appendix "A", Pages 64a through 67a), in any three situations the facts are even stronger than in the McCartin case and in which, a fortiori, the first proceedings have been held not to prejudice the second: (1) The prior voluntary payment of compensation; (2) The ex parte request by the employer for determination of compensation owed to the employee where the employee has not participated in such initial proceedings (the Texas case of *Standard Accident Insurance Company vs. Skidmore,* cited supra); and (3) the denial of compensation, as distinguished from the award of a certain amount of compensation benefits, by the first state, which denial does not under full faith and credit necessitate or warrant a denial of compensation benefits in a second state. All three of these favorable fact situations exist in the instant case.

It is indeed unfortunate that the *McCartin* case and the attached *Larson* treatise exposition were not brought to the attention of either the trial court or the Court of Appeal herein, since surely had either of those lower courts been apprised of this subsequent development in the United States Supreme Court's jurisprudence, the result would have been a denial of the defendant's peremptory exception urging res judicata.

The opportunity, of course, still exists for this Court to not perpetuate the judicial deprivation of workmen's compensation benefits which plaintiff should recover from defendant.

ARGUMENT ON ASSIGNMENT OF ERROR NO. 7

> *The Court of Appeal erred in concluding that defendant had a right to treat its workmen's compensation payments to plaintiff as payments made pursuant to the law of Texas where the contract documents, which were binding on defendant insurer, obligated the latter to pay workmen's compensation in accordance with the law of the state where the van line was domiciled, or in this case, the law of the state of Georgia.*

It is further submitted that the Court of Appeal erred in concluding that the specific language contained in the contract documents that the compensation remedy would be pursuant to the law of the state where the van line was domiciled, which in this case would be Georgia, the domicile of U. S. Van Lines, Inc. of Atlanta, Georgia, can be disregarded because the Certificate of Insurance contains the words "applicable in each state". This language in the Certificate of Insurance must be read in connection with the contract documents which particularize which state law is applicable and specify that it be the law of the state where the van line is domiciled. The contract documents offered in evidence were prepared by the defendant, and must be construed against defendant as the author

thereof. Defendant cannot properly urge that the language "applicable in each state" contained in the Certificate of Insurance abrogates the specific language contained in the other contract documents. The language of the contract documents is specific and unequivocal:

> "By becoming a member of the Motor Truck Owners' Conference and authorizing the van line to whom you are under contract to withhold from your revenue an amount equal to Workmen's Compensation premium, *you and your employees are covered* under the Workmen's Compensation policy issued to Motor Truck Owners' Conference, Inc. in the Universal Underwriters Insurance Company *according to the terms of the Workmen's Compensation Act of the state in which the van line is domiciled.*"
> (Exhibit "D", Record, Page 30 — emphasis added)

At the time of the accident "the van line to whom [Keller Industries, Inc. was] under contract" was U. S. Van Lines, Inc. of Atlanta, Georgia, with plaintiff being the specified authorized driver of the moving van involved in the accident. (Exhibit "E", Record Page 31. See also testimony of Marvin (erroneously shown in the transcript as "Martin") Keller, President of Keller Industries, Inc. (Record Pages 54, 55).

The Georgia Workmen's Compensation Act is similar to the Louisiana Workmen's Compensation Act, in

that under Georgia law, like under Louisiana law, plaintiff is entitled to pursue both his compensation remedy and his tort remedy against third parties. This is evidenced by Section 114-403 of the Georgia Workmen's Compensation Act, as amended, which statutory provision is attached to the application for rehearing as Exhibit "II". Louisiana law is to the same effect, see Louisiana Revised Statute 23:1101 through 1103. Accordingly, both the Georgia workmen's compensation law and the Louisiana compensation law differ entirely from the Texas workmen's compensation law, as both Georgia and Louisiana permit the injured-employee to pursue both a tort remedy and a compensation remedy.

Accordingly, defendant's attempted selection of Texas workmen's compensation law as the law applicable to this claim was invalid and in violation of the contract documents, and its unilateral attempt to rely on the so-called Texas "final award" so as to bar plaintiff's right to compensation is likewise unjustified.

If defendant wanted to establish that the Certificate of Insurance abrogated the restricted choice of law as set forth in the foregoing contract document, it was incumbent upon defendant to offer a certified copy of the insurance policy in order to establish its right to have its peremptory exception of *res judicata* sustained. Defendant bears the burden of proving it can properly be sustained. The failure of defendant to offer a certified copy of the policy or to explain the alleged discrepancy between the restricted choice of law contained in the foregoing quoted contract document and

the supposed contradiction therewith as reflected in the Certificate of Insurance, constitutes still another reason for denying defendant's attempt to have this suit dismissed.

CONCLUSION

For the foregoing reasons, Newal W. Griffin, plaintiff-appellant urges this Honorable Court to reverse the judgment of the Court of Appeal, First Circuit, and to reverse the judgment of the Twenty-third Judicial District Court in and for the Parish of Ascension, sustaining the peremptory exception urging res judicata filed on behalf of defendant, and dismissing this suit, to overrule the peremptory exception urging res judicata, and to remand this suit to the Twenty-third Judicial District Court in and for the Parish of Ascension for further proceedings.

APPENDIX "A"

EXCERPT
FROM
LARSON, WORMKEN'S COMPENSATION,
VOLUME 3, pages 369-380*

§ 85 SUCCESSIVE AWARDS IN DIFFERENT STATES

§ 85.00 More than one statute can apply to a single compensable injury, so long as each state has a rele-

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*(Sentences which are emphasized in the reproduced excerpt from the treatise are by the author of this brief.)

vant interest in the case. Successive awards can be made in different states, deducting the amount of the first award from the second.

§ 85.10 *The "Magnolia" doctrine*

An appraisal of the present rule on successive awards in different states must take the form of an analysis of two Supreme Court decisions, the *McCartin*[29] case and the *Magnolia*[30] case. *It is now generally accepted that the McCartin case, in practical effect, has recognized the principle of successive awards and thereby discredited the Magnolia case,* which had held on its facts that a prior Texas award was a constitutional bar to an award in Louisiana of the amount by which the Louisiana benefits exceeded those allowed by Texas.

Since, however, the *McCartin* case did not expressly overrule the *Magnolia* case, it is necessary to scrutinize the two opinions with some care, to see whether the *McCartin* case has indeed established a successive-award principle of general applicability.

The story up to the time of the *McCartin* case can be quickly told. The state courts, with virtual unanimity, had held or assumed that a prior award under the laws of another state was no bar to an award under local law made in accordance with the local law's own

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[29]Industrial Comm'n v. McCartin, 330 U.S. 622, 67 S. Ct. 886, 91 L. Ed. 1140, 169 A.L.R. 1179 (1947).

[30]Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 64 S. Ct. 208, 88 L. Ed. 149, 150 A.L.R. 413 (1943).

standards of applicability,[31] always of course, with the understanding that the claimant could not have a complete double recovery but must deduct from his present recovery the amount of the prior award.

Then, in 1943, an oil field laborer, whose supplementary award in Louisiana, after a Texas award, had been sustained by the Louisiana appellate courts, appeared *pro se* to defend his award against constitutional attack in the Supreme Court of the United States. His failure gave us the *Magnolia* case, a five-to-four decision, with two dissents. The rationale of the holding was that "in Texas, a compensation award ... is explicitly made by statute in lieu of any other recovery" for the same injury; the award therefore became res adjudicata and was entitled to full faith and credit in other jurisdictions like any judgment. The case evoked widespread controversy, with many writ-

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[31] *Massachusetts:* McLaughlin's Case, 274 Mass. 217, 174 N.E. 338 (1931).

Migues' Case, 281 Mass. 373, 183 N.E. 847 (1933).

New Jersey: Sweet v. Austin Co., 12 N.J. Misc. 381, 171 A. 684 (1934).

New Mexico: Hughey v. Ware, 34 N.M. 29, 276 P. 27 (1929).

New York: Bach v. Hampden Sales Ass'n, 293 N.Y. 847, 59 N.E. 2d 439 (1944).

Gilbert v. Des Lauriers Column Mould Co., 180 App. Div. 59, 167 N.Y. Supp. 274 (1917).

South Carolina: Price v. Horton Motor Lines, Inc., 201 S.C. 484, 23 S.E.2d 744 (1942).

Wisconsin: Interstate Power Co. v. Industrial Comm'n, 203 Wis. 466, 234 N.W. 889 (1931).

Salvation Army v. Industrial Comm'n, 219 Wis. 343, 263 N.W. 349, 101 A.L.R. 1440 (1935).

Accord, *Restatement of the Conflict of Laws* § 403, as worded prior to 1947 amendment. See § 85.20, N. 36 *infra*.

ers deploring the new turn of events and favoring the dissenting views.[32]

§ 85.20 *The "McCartin" doctrine*

Four years later, the *McCartin* case, in which the Supreme Court of Wisconsin, on the strength of the *Magnolia* doctrine, had denied a supplementary recovery in Wisconsin[33] after an Illinois award, reached the Supreme Court of the United States. Here an Illinois resident had made a contract of employment with an Illinois employer in Illinois, pursuant to which he did some work in Wisconsin, in the course of which he was injured. He began compensation proceedings in both states. While the Wisconsin proceedings were pending, the Illinois commission issued a formal order approving a settlement agreement under Illinois law, and full payment was made under the order. The settlement contract, however, contained this sentence: "This settlement does not affect any rights that applicant may have under the Workmen's Compensation Act of the State of Wisconsin."

The Supreme Court of the United States, this time by unanimous vote, reinstated the Wisconsin award,

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[32]Freund, "Chief Justice Stone and the Conflict of Laws," 69 Harv. L. Rev. 1210 (1946); Wolkin, "Workmen's Compensation Award — Commonplace or Anomaly in Full Faith and Credit Pattern," 92 U. of Pa. L. Rev. 401 (1944); 44 Col. L. Rev. 330 (1944); 48 Dick. L. Rev. 194 (1944); 12 Geo. Wash. L. Rev. 487 (1944); 19 Ind. L.J. 268 (1944); 17 So. Cal. L. Rev. 315 (1944); 18 Tul. L. Rev. 509 (1944).

[33]McCartin v. Industrial Comm'n, 248 Wis. 570, 22 N.W.2d 522 (1946).

distinguishing the *Magnolia* case. *The primary ground of distinction was not, however, the express reservation of Wisconsin rights, but the absence in the Illinois statute or case law of an explicit prohibition against seeking additional or alternative relief under the laws of another state. Since the vast majority of compensation laws resemble the Illinois law in this respect, the decision has been taken to mean that for all practical purposes successive awards are now sanctioned.*[34] The amendment of the Restatement, designed to bring it into harmony with these decisions,[35] adopted this interpretation by using the following language:

> "Award already had under the Workmen's Compensation Act of another state will not bar a proceeding under an applicable Act, unless the Act where the award was made was designed to preclude the recovery of an award under any other Act, but the amount paid on a prior award will be credited on the second award."[36]

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[34] Writers for law reviews have almost unanimously interpreted the case as in effect overruling *Magnolia* for purposes of most state statutes: 60 Harv. L. Rev. 993 (1947); 33 Corn. L.Q. 310 (1947); 23 Ind. L.J. 214 (1947); 19 N.Y.S.B.A. Bull. 199 (1947). Cf. 47 Colum. L. Rev. 846 (1947).

[35] Goodrich, *Conflict of Laws* 289 (3d ed. 1949).

[36] *Restatement of Conflict of Law* § 403. The "Proposed Official Draft of the Restatement of the Law Second, Conflict of Laws," dated May 1, 1968, streamlines the statement of the rule to the following concise version:

"§ 182. Effect of Two Statutes Governing Injury

"Relief may be awarded under the workmen's compensation statute of a State of the United States, although the statute of a sister state is also applicable."

The crucial paragraph of the *McCartin* opinion, setting forth the reason for its conclusion (before anything is said about the express reservation in the contract) is sufficiently important to warrant quotation in full. The Court first quotes the Illinois exclusive-coverage clause and shows that it means in Illinois (as it does in practically every other state) that it is exclusive only in the sense that no other common law or statutory remedy *under local law* can be sought. The Court then goes on to say:

> "But there is nothing in the statute or in the decisions thereunder to indicate that it is completely exclusive, that it is designed to preclude any recovery by proceedings brought in another state for injuries received there in the course of an Illinois employment. [Citing cases] And in light of the rule that workmen's compensation laws are to be liberally construed in furtherance of the purpose for which they were enacted [citing cases], we should not readily interpret such a statute so as to cut off an employee's right to sue under other legislation passed for his benefit. Only some unmistakable language by a state legislature or judiciary would warrant our accepting such a construction. Especially is this true where the rights affected are those arising under legislation of another state and where the full faith and credit provision of the United States Constitution is brought into play. [Citing cases]

> "We need not rest our decision, however, solely upon the absence of any provision or construction of the Illinois Workmen's Compensation Act forbidding an employee from seeking alternative or additional relief under the laws of another state . . . ."[37]

At this point the Court discusses the express reservation of rights in Wisconsin, and concludes with these significant words:

> "the reservation *spells out* what we believe to be *implicit in that Act* — namely, that an Illinois workmen's compensation award of the type here involved does not foreclose an additional award under the laws of another state."[38]

Thus, the Court comes back to its basic and original ground, the nature of the statute itself, and says that the express reservation does no more than make abundantly clear what the act of itself must in any case be construed to mean.

§ 85.30 *What states are affected by McCartin rule*

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[37] 67 S. Ct. at 889.

[38] 67 S. Ct. at 890. Italics supplied.

A more careful reading of the opinion at this point would have prevented the blunder in Bolton v. O'Connor, 114 F.Supp. 273 (S.D. Miss. 1953). Injury was in Mississippi, contract and residence in Louisiana. Award was made in Mississippi, and later another sought in U.S. District Court of Mississippi under Louisiana law. *Held:* Magnolia Rule applicable; *McCartin* case distinguished on the sole ground that it was based on the stipulation between the parties.

The decisive question therefore becomes: Does the statute of a given state, as construed by "unmistakable language," forbid relief under the laws of another state? One thing is clear: The normal exclusive-coverage cause does not have this effect, as the *McCartin* opinion itself recognizes.[39] It is therefore important to observe, in estimating the impact of *McCartin* on *Magnolia*, that the general exclusive coverage clause of Texas was not significantly different from that of Illinois. Texas did, however, have an express statutory provision, existing in very few other states,[40] that if

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[39]Curiously, this elementary point was missed by the District of Columbia Court of Appeals in Gasch v. Britton, 202 F.2d 356 (D.C. Cir. 1953); Fahy, J., dissenting. The Court denied an award in the district after an award had been made in Maryland, on reasoning similar to that in the *Magnolia* case. The decision was based on the exclusive coverage provision relating to suit against the employer, that compensation shall be in lieu of "any and all rights of action whatsoever against any person whomsoever." The Court made much of broad exclusiveness language from Victory Sparkler & Specialty Co. v. Francks, 128 A. 635 (Md. App. 1925), which however, was nothing more than a garden-variety holding that the compensation remedy is exclusive of common-law actions, and contained no language, unmistakable or other, on compensation awards in sister states. Here the employee lived in Maryland and was injured there, but the place of employment contract was in the District of Columbia.

[40]See also, Nevada Indus. Comm'n v. Underwood, 79 Nev. 496, 387 P.2d 663 (1963). Nevada law (Nev. Rev. Stat. § 616.530(1) (1963)), provides that "any action or proceeding in any other state to recover damages or compensation . . . shall constitute an irrevocable waiver of any and all compensation" under the Nevada laws. The employee was hired in Idaho, was regularly employed in Nevada, but was killed in an accident in Utah. The widow filed a claim on which benefits were voluntarily paid under the Idaho compensation laws. The claim and payment were held to effect the irrevocable waiver, although she and the carrier had expressly agreed that she reserved

an employee *first* obtains compensation in another state for an out-of-state injury, he shall not *thereafter* get an award in Texas. Note that this is not the present situation, but its reverse. *The statute does not go on to say what the Magnolia opinion reads into it, that if the employee first obtains compensation in Texas he shall not thereafter get compensation outside of the state.* The *McCartin* opinion seems to hold that this latter kind of prohibition must now appear in the statute or case law of a particular state if the *Magnolia* doctrine is to apply. *On this interpretation of the McCartin rule, the Magnolia doctrine will apparently not apply even in Texas, once its statute and decisions are realistically construed. For it cannot honestly be said that anything in the Texas statutes or cases indicates that, when the sequence of events takes the form of a first award in Texas and a supplementary award in another state to bring the amount up to the standards of the latter, the State of Texas has any*

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her rights to claim death benefits under the Nevada law. Court dicta indicated that the quoted Nevada provision, referring to "action" and "damages," applied to common-law actions, while "proceeding" and "compensation" applied to compensation claim proceedings, but an unsuccessful action or proceeding would not bar a subsequent claim under the Nevada law. Treatise cited.

Arizona and Oregon provide that their own laws shall not apply to out-of-state injuries if the law of the state of injury applies. But this is quite a different matter, since it delimits local coverage generally and leaves nothing to the claimant's election. Similar in this respect is the Massachusetts provision that if an employee has elected, under a foreign act permitting such election, to remain under common-law rules generally, he shall not be covered by compensation in Massachusetts. This too is not an election, for the purpose of a particular injury, between coexisting rights, but a definition in advance of the basic scope of the local statute. . .

unconquerable aversion to the second award. All Texas says is that if some other state has first awarded compensation, it will add nothing to it in a later proceeding brought in Texas.

§ 85.40 *Application of McCartin rule by states*

The above analysis of the *McCartin* decision's effect has been confirmed, not only by the Restatement and almost all writers,[41] but also by the great majority of subsequent cases.[42] *Cook v. Minneapolis Bridge*

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[41] § 85.20, Ns. 34, 35, and 36 *supra*.

[42] *Arizona:* Agee v. Industrial Comm'n, 10 Ariz. App. 1, 455 P.2d 288 (1969). Claimants, residents of Colorado who were hired in Colorado, were injured while on a trucking run in Arizona on their way to California. They received lump sum settlements in Colorado, and then sought recovery in Arizona. *Held:* nothing in the settlements barred further recovery in Arizona, and claimants were entitled to the additional benefits provided by Arizona law.

Florida: de Cancino v. Eastern Airlines, 239 So. 2d 15 (Fla. 1970). Prior filing of a compensation claim in New York held not to bar the filing of a claim and an award of benefits in Florida, where Florida did have jurisdiction over the accident, the only limitation being that credit would have to be given for any benefits received in New York.

Massachusetts: Lavoie's Case, 334 Mass. 403, 135 N.E.2d 750, *cert. denied*, 352 U.S. 927, 77 S. Ct. 224, 1 L. Ed. 2d 162 (1956). Rhode Island resident who made employment contract there and had received benefits under its act for an injury in Massachusetts held entitled to recovery under Massachusetts act.

Michigan: Schenkel v. Tower Builders Co., 380 Mich. 492, 157 N.W.2d 204 (1968). Claimant, an Indiana resident, was employed by an Indiana corporation. While performing some work in Michigan he suffered disabling injuries. Compensation was applied for and recovered in Indiana, whose compensation act had been construed to be exclusive. Claimant then applied for and received additional benefits in Michigan, with credit being given for weekly payments made under the Indiana

act. The court held that the acceptance of benefits under the Indiana act did not deprive Michigan of jurisdiction to award additional benefits under its act, and the full faith and credit clause of the United States Constitution did not bar the receipt of benefits under the act of one state after an award has been made in another state whose statute had been construed so as to be exclusive in application.

Minnesota: Cook v. Minneapolis Bridge Constr. Co., 231 Minn. 433, 43 N.W.2d 792 (1950).

Accord: Sorenson v. Standard Constr. Co., 238 Minn. 68, 55 N.W.2d 630 (1952).

Mississippi: Martin v. L & A Contracting Co., 249 Miss. 441, 162 So.2d 870 (1964). Claimant was hired and regularly employed in Mississippi but was injured in Florida. *Held:* he could receive benefits under both the Florida and Mississippi Compensation Acts, deducting the amount of the first award from the second. Treatise cited.

Harrison Co. v. Norton, 244 Miss. 752, 146 So. 2d 327 (1962). The claimant was employed under a contract made in Georgia to work in Mississippi, his residence and the place of injury. The carrier voluntarily made payments under the Georgia act and the claimant signed a Georgia form for "Final Compensation Settlement Receipt." He later brought a claim for permanent partial disability under the Mississippi act. The court reasoned that since the Mississippi act states that "No agreement by an employee to waive his right to compensation under this act shall be valid" (Miss. Code Ann. § 6998-21 (1942) Rec., § 15), the "Final Receipt" of Georgia benefits did not bar a claim for Mississippi benefits. The court limited its decision to permitting a subsequent award, with credit for previous benefits paid, where the first award was granted under those state acts, such as Georgia, which do not specifically make an award in such state exclusive. Treatise quoted.

New Jersey: Cramer v. State Concrete Corp., 39 N.J. 507, 189 A.2d 213 (1963). An award under the New York act does not bar the claimant's right to claim benefits under the New Jersey act. Treatise cited.

Bowers v. American Bridge Co., 43 N.J. Super. 48, 127 A.2d 580, *aff'd* 24 N.J. 390, 132 A.2d 28 (1956). New Jersey awarded benefits even though claimant had received payment in Pennsylvania, the place of injury, because the Pennsylvania act does not expressly exclude the right of recovery by an injured workman under the laws of any other state. Treatise cited.

Hudson v. Kingston Contracting Co., 58 N.J. Super. 455, 156

Construction Company is typical.[43] Here the employer's business, the employee's residence, and the place of contracting were in Minnesota, while the place of injury was in North Dakota. Benefits were first received under a North Dakota award. The exclusive-remedy clause of the North Dakota statute was admittedly even stronger than that of Illinois, for it provided that injured employees 'shall have recourse . . . only to the fund and not to the employer" and in another section that "the payment of compensation ... shall be in lieu of any and all rights of action whatsoever." *But since the statute did not explicitly preclude proceedings in another state, the Minnesota Supreme Court held that the McCartin rule permitted a supplementary award in Minnesota.*

The Wisconsin Supreme Court, confronted with a similar set of facts, laid its stress on the question

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A.2d 491 (1959). The deceased employee was a resident of Pennsylvania, the employer was domiciled in New Jersey, the place of contract was New Jersey, and the fatal accident occurred in Maryland. The widow was awarded $10,300 under the Maryland compensation act but would receive $36,855.02 under the New Jersey act. The court followed the *McCartin* case, holding that the Maryland act was exclusive only as to rights arising in Maryland. The difference in the awards was found to be so great as to be obnoxious to the policy of the New Jersey act, justifying the denial of full faith and credit. New Jersey benefits were awarded less the amount paid under the Maryland award. The court specifically followed the dissenting opinion in Gasch v. Britton, § 85. 30, N. 39 *supra*.

Contra:

Federal: Gasch v. Britton, § 85.30, N. 39 *supra*.

Bolton v. O'Connor, § 85.20. N. 38 *supra*.

[43]231 Minn. 433, 43 N.W.2d 792 (1950).

of finality of the first award.[44] A prior award has been made in Montana for temporary total disability, and payments were still running at the time of the Wisconsin award. The Wisconsin Court observed that the Montana Board had continuing jurisdiction over the award, and could later determine any permanent disability that might exist. The first award was therefore not "final," and, under the *Magnolia* and *McCartin* opinions, not binding on other states. Whether the *Magnolia* decision meant final in this sense or final in the sense that the exact points covered by the particular award, being unappealed,[45] could not be reopened, may be debatable; but this case in any event is one more illustration of the tendency toward construction of the *Magnolia* rule.

§ 85.50 *Prior voluntary payment or denial*

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[44]Spietz v. Industrial Comm'n, 251 Wis. 168, 28 N.W.2d 354 (1947). See also, Plater v. Kane Warehouse Co., 241 Md. 733, 217 A.2d 102 (1966). Claimant regularly worked in Washington and Virginia, but was injured in Maryland. An award was made under the Maryland act, but claimant also filed under the Washington act, which provided greater benefits. Claimant was permitted to withdraw the Maryland claim and proceed under the Washington act.

[45]Chapman v. John St. John Drilling Co., 73 N.M. 261, 387 P.2d 462 (1963). The employee was awarded compensation in Texas, but appealed the award. He then filed a claim under the New Mexico act. The New Mexico Supreme Court avoided an application of the *Magnolia* doctrine by noting that, under Texas law, a case pending appeal is not res judicata, and therefore full faith and credit need not be given in New Mexico. Dismissal of the claim under the New Mexico act reversed and remanded for hearing and determination. Treatise cited.

Several variants of the successive-award problem may be mentioned in each of which the facts are much stronger than in the *McCartin* case and, in which, *a fortiori*, the first proceedings have been held not to prejudice the second. *Several cases, both before and after McCartin, have held that a prior voluntary payment of compensation accepted by the employee under the laws of one state does not detract from the employee's statutory right to an award in another state, whether the agreement for compensation had received commission approval or not.*[46] *Similarly, when the em-*

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[46] *California:* Industrial Indem. Exch. v. Industrial Acc. Comm'n, 80 Cal. App. 2d 480, 182 P.2d 309 (1947).

Kentucky: Industrial Track Builders of Am. v. LeMaster, 429 S.W.2d 409 (Ky. App. 1968). Claimant received benefits under Indiana law, and then filed a claim in Kentucky. Shortly after injury claimant signed an agreement with the carrier to receive benefits under the Indiana act, but took no further action, other than to receive benefits. The court held that since there was no express intention in the Indiana statute to have its law be exclusive, claimant was allowed to file a subsequent claim in Kentucky. However, the court indicated that in other circumstances, such as if claimant had knowingly filed a claim in Indiana and prosecuted it to a final award, he might not be entitled to later claim benefits in Kentucky. Treatise quoted.

Michigan: Cline v. Byrne Doors, Inc., 324 Mich. 540, 37 N.W.2d 630, 8 A.L.R.2d 617 (1949).

Adams v. Emery Transp. Co., 15 Mich. App. 593, 167 N.W.2d 110 (1969). Claimant worked for two trucking companies, which eventually merged. He was injured prior to the merger, and filed two compensation claims, one against one of the firms in Illinois, and the other in Michigan, against both firms. The Illinois claim was settled, including an agreement that Illinois had exclusive jurisdiction, and that claimant would dismiss the Michigan proceedings. However, he did not do so, and eventually was awarded compensation against the employer which had not been involved in the Illinois claim. On Appeal, the court held that although it was not satisfied with the result, the Illinois settlement would not bar further proceedings in Michigan, and the Michigan employer could not

ployee has not applied for compensation, but an award has been entered at the ex parte request of the employer, even Texas, with its express statute forbidding an award to one who has "elected to pursue his remedy" in another state, permits a supplementary award.[47]

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take credit for any amount paid pursuant to the Illinois decree, which involved a different employer.

New Jersey: Miller v. National Chair Co., 19 N.J. Misc. 275, 18 A.2d 847, *aff'd*, 127 N.J.L. 414, 22 A.2d 804 (1941), *aff'd per curiam*, 129 N.J.L. 98, 28 A.2d 125 (1942).

Della Vecchia v. World Scope Publishing Co., 64 N.J. Super. 333, 165 A.2d 872 (1960). The claimant was awarded New York compensation without appearance before the board or service of process. He cashed the checks. The court held that his actions did not bar a claim under the more generous provisions of the New Jersey compensation act.

New Mexico: Franklin v. George P. Livermore Inc., 58 N.M. 349, 270 P.2d 983 (1954). Employment contract in New Mexico, injury in Texas; voluntary payments under Texas law did not amount to a waiver of any rights under New Mexico law.

See also, Reed v. Fish Eng'r Corp., 74 N.M. 45, 390 P.2d 283 (1964). Payment of Utah benefits may toll the statute of limitations of filing a later claim for New Mexico benefits. Case remanded.

And cf. Pate v. Makin Drilling Co., 66 N.M. 402, 349 P.2d 121 (1960). The employee of a New Mexico firm was sent from New Mexico to an oil field in Texas, where he was injured. Compensation was paid under the Texas compensation act until the benefits expired. The employee then filed claim for benefits under the New Mexico act. A lower court order requiring the employer to pay medical benefits was reversed. The court stated that the order would have been tantamount to a finding that the employer was also liable under the New Mexico act before such liability had been determined.

[47]Standard Acc. Ins. Co. v. Skidmore, 222 S.W.2d 344 (Tex. Civ. App. 1949).

Texas Employers' Ins. Ass'n v. Miller, 370 S.W.2d 12 (Tex. Civ. App. 1963). The Texas insurance carrier had the employee sign an "election of benefits" statement upon receipt of voluntarily paid Louisiana benefits. The court held that since he

Moreover, a denial of compensation in the first state does not necessitate a denial in the second state.[48] Thus, when the employment contract was in Missouri and the injury in Arkansas, a denial of compensation in Arkansas, on the ground that claimant was an independent contractor, was held not to require a denial in Missouri, since each state may have its own interpretation of employee status.[49]

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did not read the statement, and, having only a fourth grade education, did not understand what he was signing, the equitable rule abhorring elections would support a finding that no election had been made. Texas benefits award, supplemental to the Louisiana benefits, affirmed.

[48] *Maine:* Smith v. Heine Safety Boiler Co., 119 Me. 552, 112 A. 516 (1921).

Missouri: Loudenslager v. Gorum, 355 Mo. 181, 195 S.W.2d 498, *cert. denied,* 331 U.S. 816, 67 S. Ct. 1301, 91 L. Ed. 1834 (1946).

New Mexico: La Rue v. El Paso Natural Gas Co., 57 N.M. 93, 254 P.2d 1059 (1953). Denial of award by Arizona, on the ground that the injury did not arise in the course of the employment, was not a bar at a subsequent suit in New Mexico. Claimant was injured in Arizona, and resided there, but was employed in New Mexico and had been working there. This is significant since New Mexico will not allow a double recovery there for the same accident because it is contrary to public policy. Hughey v. Ware, 34 N.M. 29, 276 P.2d 27 (1929). Court stated that since claimant here had not received an award in Arizona this decision did not conflict with the *Hughey* case.

New York: Yoshi Ogino v. Black, 278 App. Div. 146, 104 N.Y.S.2d 82 (1951).

Oklahoma: Le Flore County Gas & Elec. Co. v. Sickmann, 348 P.2d 312 (Okla. 1959). Since the contract of hire was consummated in Oklahoma, a denial in Arkansas did not preclude an award in Oklahoma.

[49] Loudenslager v. Gorum, N. 48 immediately *supra* under *Missouri.*